THE JOURNAL OF LIBERTARIAN STUDIES

AN INTERDISCIPLINARY REVIEW

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Bureaucracy and the Civil Service in the United States

Antony Flew
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VOLUME 11, NUMBER 2, SUMMER 1995

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EDITORIAL

It is our sad duty to notify our readers that Murray N. Rothbard, editor of the *Journal of Libertarian Studies* since its inception in 1977, has passed away. He died peacefully on January 7, 1995, in New York City.

This is not the place for an obituary. Nor is this the time yet for a full-scale appreciation of what Murray Rothbard has meant to libertarianism in general and to the *Journal of Libertarian Studies* in particular. Volume 12, Number 1 of the *Journal of Libertarian Studies* will be devoted to a *Festschrift* in honor of Murray Rothbard.

At the present our goal is more modest: to take stock of where the *Journal of Libertarian Studies* has come from since its birth in 1977 and to announce our editorial policy and indicate our hopes for the future.

The *Journal of Libertarian Studies* was launched by Murray Rothbard with several objectives in mind. In the words of the "Editorial" with which the journal began, these were "not simply to provide an outlet for scholarship and research that may be unpopular in a particular discipline. It is the belief that there is a new and growing interdisciplinary discipline — libertarianism — enriched by contributions in each of the particular and seemingly isolated fields that study human action ... we hope to stimulate significant expansion in the research and production of scholarly libertarian material. We hope to intensify the development of the emerging discipline of libertarianism. Finally, we expect that the existence of the *Journal* will serve to multiply the number of libertarian scholars and to intensify communication among and cross-fertilization of them."

During the past two decades, great strides toward the achievement of these goals have been made, and Murray Rothbard and the *Journal of Libertarian Studies* have played a pioneering role in the forging of a flourishing international ideological movement. Libertarianism is still anything but "mainstream", but it has grown into an intellectual force which can no longer be ignored. In addition to the *Journal of Libertarian Studies,* there are now numerous libertarian-oriented journals, and libertarian scholarship increasingly has found entrance into many "mainstream" publications. We welcome and are greatly encouraged by this development. However, although it is now better known than it was twenty years

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ago, the level of unfamiliarity with libertarian thought continues to constitute a serious barrier to scholarly communication and debate. To this end, the *Journal of Libertarian Studies* will continue its commitment to provide a sympathetic forum for scholars seeking to strengthen the foundations or extend the frontiers of libertarianism.

Typically, when a new editorial team takes over the reins, all sorts of new promises are made. In this case, nothing could be further from the truth. Rather than aiming to do "bigger and better" things, we shall be very happy indeed if we can even approach the meticulous standards set and maintained by Murray Rothbard.

We shall maintain policy precisely as it was before, to the best of our ability. Specifically, as stated in the introductory "Editorial", the *Journal of Libertarian Studies* will publish scholarly work in "philosophy, political science, economics, history, law, sociology, geography, anthropology, education, and biology ... Whether or not the scholar is personally a libertarian will not be a criterion for acceptance of a manuscript; rather, the criterion will be whether an article will advance the discipline of libertarianism, regardless of the personal beliefs of the author."

We feel the loss of our friend Murray N. Rothbard keenly. We shall strive to follow the path he so ably blazed. Although none of us ever studied formally with Murray, his example affected us far more profoundly than any of our formal teachers. He was our intellectual guide and mentor. He will be sorely missed.

Walter Block
David Gordon
Hans-Hermann Hoppe
Joseph T. Salerno

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BUREAUCRACY AND THE CIVIL SERVICE IN THE UNITED STATES

*Murray N. Rothbard**

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* Murray N. Rothbard (1926-1995) was the S. J. Hall Distinguished Professor of Economics at the University of Nevada, Las Vegas.

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BUREAUCRACY AND THE CIVIL SERVICE IN THE UNITED STATES

One of the most important sociological laws is the "Iron Law of Oligarchy": every field of human endeavor, every kind of organization, will always be led by a relatively small elite. This condition will hold sway everywhere, whether it be a business firm, a trade union, a government, a charitable organization, or a chess club. In every area, the persons most interested and able, those most adaptable to or suited for the activity, will constitute the leading elite. Time and again, utopian attempts to form institutions or societies exempt from the Iron Law have fallen prey to that law: whether it be utopian communities, the *kibbutz* in Israel, "participatory democracy" during the New Left era of the late 1960s, or the vast "laboratory experiment" (as it used to be called) that constituted the Soviet Union. What we should try to achieve is not the absurd and anti-natural goal of eradicating such elites, but, in Pareto's term, for the elites to "circulate." Do these elites circulate or do they become entrenched?

I. The Market vs. Government

The free market economy provides an unparalleled example of a continuing healthy circulation of elites. In this dynamic economy, failure to keep up with competitors, failure to satisfy the demands of consumers in the best possible way, will topple elites quickly and establish new ones who do the job better. Ludwig von Mises wrote frequently of the inappropriateness of leftists referring to so-and-so as the "Steel King" or the "Automobile King"; for consumers frequently uncrown these alleged monarchs. Dethroning of financial monarchs on Wall Street is a frequent phenomenon. There are innumerable striking examples of big businesses failing to grasp the importance of a new product or new development, and of losing out to newer upstarts. I will refer to only two glaring cases experienced in my lifetime: the cry of leftists to "break up A&P" in the 1930s because of its alleged "monopoly" of the retail grocery business; and the failure of the old-time photography "monopolist" Eastman-Kodak to grasp the enormous significance, after World War II, of either instant photography or xerography, thereby leaving the field to newer, and more alert competitors.

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By its nature, government is not subject to the profit-and-loss test, to the domination by the consumers, of the free market. Even voluntary non-profit organizations, while not seeking maximum profit, at least have to be efficient enough to avoid severe losses or bankruptcy. Furthermore, such voluntary organizations at least must satisfy the values and demands of their donors, if not the users of the good or service as in the profit-making market. But government is unique among organizations in attaining its revenue via the coercion of taxpayers. Hence, government suffers no worries about losses or bankruptcy; it need serve no one except itself. The only limit on government is the enormously wide one of people rising up to refuse to obey its orders (including taxes); short of such revolution, however, there is little to limit government or to check the entrenchment or burgeoning of its elite.[1]

Government, in short, is particularly subject to the well-known evils of an arrogant, hidebound, inefficient, red-tape-ridden ever-expanding "bureaucracy." Socialists, even during the seeming heyday of the Soviet Union, were often worried about the problem of bureaucracy, and have tried vainly to detach government from its bureaucratic aspect. But Mises trenchantly pointed out in his classic *Bureaucracy* that all such hopes are in vain. Bureaucracy, with all its evident evils, goes hand-in-hand with government. A profit-making firm saves and invests its money, attempting to make profits and avoid losses; its use of funds is flexible, dependent on its profit-seeking decisions. But bureaucratic agencies have their allocated funds from the government budget. And strict, precise, quibbling, rule-keeping is vital so that each bureaucrat and sub-bureaucrat can demonstrate that he has used the funds in the manner designated by the legislature or Chief Executive, and has not put them into his own pocket or spent them in some other, non-authorized way.[2]

Mises points out a crucial difference between bureaucratic and profit management. Business expenditures and products are gauged by the valuations of consumers, whose judgments "are congealed into an impersonal phenomenon, the market price." Moreover, consumer judgments are levied on the goods and services, not on the producers themselves. "The seller-buyer nexus as well as the employer-employee relation in profit-seeking business," Mises

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[1] The remarkable August Days in Moscow and elsewhere in the Soviet Union in 1991 was a glorious example of just such a limit to tyranny being reached.

[2] Ludwig von Mises, *Bureaucracy* (New Haven: Yale University Press, 1944).

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declares, "is a deal from which both parties derive an advantage." But in government, in bureaucratic organization, on the other hand, what the nation "gets for the expenditure, the service rendered, cannot be appraised in terms of money, however important and valuable this 'output' may be." Instead, Mises points out, "its appraisal depends on the discretion of the government" — that is, on arbitrary, personal decisions. Mises adds that "the nexus between superior and subordinate is personal. The subordinate depends on the superior's judgment of his personality, not of his work." In short, in government bureaucracy, there is no reality check.[3]

As Mises analyzes the difference for a branch agency: In a government bureau,

> It is not because of punctiliousness that the administrative regulations fix how much can be spent by each local office for cleaning the premises, for furniture repairs, and for lighting and heating. Within a business concern such things can be left without hesitation to the discretion of the responsible local manager. He will not spend more than is necessary because it is, as it were, his money; if he wastes the concern's money, he jeopardizes the branch's profit and thereby indirectly hurts his own interests. But it is another matter with the local chief of a government agency. In spending more money he can, very often at least, improve the result of his conduct of affairs. Thrift must be imposed on him by regimentation.[4]

In a business firm on the market, the desires and goals of the managers are yoked to the profit-making goals of the owners. As Mises says, the manager of a branch must make sure that his branch contributes to the profit of the firm. But, shorn of the regiment of profit-and-loss, the desires and goals of the managers, limited only by the prescriptions and budget of the central legislature or planning board, necessarily take control. And that goal, guided only by the

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[3] *Ibid.*, p. 53.

[4] *Ibid.*, p. 46. To the extent that business has been subject to increasing taxes and controls in the twentieth century, of course, its management has become more bureaucratic. As Mises puts it, "no profit-seeking enterprise, no matter how large, is liable to become bureaucratic provided the hands of its management are not tied by government interference. The trend toward bureaucratic rigidity is not inherent in the evolution of business. It is an outcome of government meddling with business." *Ibid.*, p. 12.

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vague rubric of the "public interest", amounts to increasing the income and prestige of the manager. In a rule-bound bureaucracy, that income and status inevitably depend on how many sub-bureaucrats report to that manager. Hence, each agency and department of government engage in fierce turf wars, each attempting to add to its functions and the number of its employees, and to grab functions from other agencies. So that while the natural tendency of firms or institutions on the free market is to be as efficient as possible in serving the demands of consumers, the natural tendency of government bureaucracy is to grow, and grow, and grow, at the expense of the fleeced and benighted tax-payers.

If the watchword of the market economy is profit, the watchword of bureaucracy is growth. How are these respective objectives to be achieved? The way to attain profit in a market economy is to beat the competitors in the dynamic, ever-changing process of satisfying consumer demands in the best possible way: to create a self-service supermarket instead of the older grocery store (even a chain store), or to create a Polaroid or a Xerox process. In other words, to produce concrete goods or services that consumers will be willing to pay for. But to attain growth, the bureaucratic manager must convince the legislature or planning board that his service will, in some vague way, aid the "public interest" or the "general welfare." Since the taxpayer is forced to pay, there is not only no incentive or reason for the bureaucrat to be efficient; there is no way that a bureaucrat, even with the most eager will in the world, can *find out* what the consumers want and how to meet their demands. Users pay little or nothing for the service, and even if they do, investors are not allowed to experience profit or loss from investing in producing that service. Therefore, the consumers will simply have to allow the bureaucrats to bestow their services upon them, whether the consumers like it or not. In building and operating a dam, for example, the government is bound to be inefficient, to subsidize some citizens at the expense of others, to misallocate resources, and generally to be at sea without a rudder in supplying the service. Moreover, for some citizens, the dam may not be a service at all; in the jargon of economists, for some people, the dam may be a "bad" not a "good". Thus, for environmentalists who are philosophically opposed to dams, or to farmers and homeowners whose property may be confiscated and flooded by the Dam Authority, this "service" is clearly a negative one. What is to happen to *their* rights and properties? Thus, government action is not only bound to be

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inefficient, and coercive against taxpayers; it is also bound to be redistributive for some groups at the expense of others.

The major group the bureaucrats benefit is, of course, themselves. Their entire income is extracted at the expense of taxpayers. As John C. Calhoun pointed out in his brilliant *Disquisition on Government*, bureaucrats pay no taxes; their alleged tax payments are a mere accounting fiction. The existence of government bureaucracy, Calhoun pointed out, creates two great conflicting classes in society: the net taxpayers, and the net tax-consumers. The greater the scope of taxes and of government, then, the greater the inevitable class conflict created in society. For, as Calhoun states:

> The necessary result, then, of the unequal fiscal action of the government is to divide the community into two great classes: one consisting of those who, in reality, pay the taxes and, of course, bear exclusively the burden of supporting the government; and the other, of those who are the recipients of their proceeds through disbursements, and who are, in fact, supported by the government; or, in fewer words, to divide it into tax-payers and tax-consumers.
>
> But the effect of this is to place them in antagonistic relations in reference to the fiscal action of the government and the entire course of policy therewith connected. For the greater the taxes and disbursements, the greater the gain of the one and the loss of the other, and vice versa; and consequently, the more the policy of the government is calculated to increase taxes and disbursements, the more it will be favored by the one and opposed by the other.
>
> The effect, then, of every increase is to enrich and strengthen the one [the net tax-consumers], and to impoverish and weaken the other [the net tax-payers].[5]

How, then can the bureaucrats achieve their overriding goal of adding to the number of their employees and therefore of their income? Only by persuading the legislature or the planning board, or the mass of public opinion as a whole, that their particular government agency is worthy of an increase in its budget. But how

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[5] John C. Calhoun, *A Disquisition on Government* (New York: The Liberal Arts Press, 1953), pp. 17-18. Also see Murray N. Rothbard, "The Myth of Neutral Taxation", *Cato Journal*, I (Fall 1981), pp. 555-58.

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can it do that, since it cannot sell services on the market, and since, moreover, its activities are necessarily redistributive and injure instead of benefit many of the consumers? What it must do is to "engineer consent", that is, it must falsely persuade the public or the legislature that its activities are a shining benefit instead of a bane to the consumers and the taxpayers. To engineer consent, it must use or employ intellectuals, the opinion-molding class in society, to persuade the public or the legislature of its function as a source of universal blessing. And when those intellectuals, or propagandists, are employed by the agency itself, this adds insult to the injury inflicted upon the taxpayers: for the taxpayers are forced to pay for their own deliberate miseducation.

It is intriguing that left-liberals invariably castigate advertising on the market for being shrill, for being misleading, and for artificially "creating" consumer demand. And yet, advertising is the indispensable method by which vital information is conveyed to the consumer — about the nature and quality of the product, and about its price and where it is offered. Oddly enough, liberals never level their critiques on the one area where they do strongly apply: the propaganda, the public relations, the hokum, put out by government. The difference is that all market advertising is soon put to a direct test: does this radio or TV work? But with government, there is no such direct consumer test: there is no way in which the citizen or voter can figure out rapidly how a specific policy worked. Furthermore, in elections, the voter is not presented with a specific program to consider: he must choose between a package deal of a legislator or chief executive for X number of years, and he is stuck for that period of time. And since there is no direct policy test, we arrive at the commonly deplored failure of the modern democratic process to discuss issues or policy, but instead to concentrate on television demagogy.[6]

II. The Structure and Goals of Bureaucracy

Bureaucracy is necessarily hierarchical, first because of the Iron Law of Oligarchy, and secondly because bureaucracy grows by adding more subordinate layers. Since, lacking a market, there is no genuine test of "merit" in government's service to consumers, in a

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[6] See Murray N. Rothbard, *Man, Economy and State: A Treatise on Economic Principles* (Auburn, AL: Ludwig von Mises Institute, 1993), II, 774-76, 843-47.

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rule-bound bureaucracy seniority is often blithely adopted as a proxy for merit. Increasing seniority, then, leads to promotion to higher ranks, while expanding budgets take the form of multiplying the levels of ranks under you, and expanding your income and power. Bureaucratic growth occurs, then, by multiplying levels of bureaucracy.

The *theory* of hierarchical government bureaucracy is that information is collected in the lowest ranks of the organization, and that at each successive higher rank, the manager culls the most important information from his subordinates, separates the wheat from the chaff, and passes the culled information higher up, so that, in the end, the President, for example, dealing with intelligence operations, receives a two-page memo distilling the most important information gathered and culled from hundreds of thousands of intelligence agents. The President, then, knows more than anyone else, say, about foreign affairs. One problem with this rosy model, as Professor Gordon Tullock points out in his illuminating book, *The Politics of Bureaucracy*,[7] is that the model doesn't ask whether or not each bureaucrat has the *incentive* to pass the best distillate of truth on to his superiors. The problem is that bureaucratic favor, especially at the higher levels, depends on pleasing one's superiors, and pleasing them largely rests on telling the President and the higher bureaucrats *what they want to hear*. One of the great truths of human history is that one tends to shoot, or at least react badly, to the bearer of bad news. "Sire, your policy is working badly in Croatia," is not the sort of message that the President, say, wants to hear from his envoy, and, while the outcome in Croatia remains in doubt, the President and his aides want to continue to believe that their policy is doing well. Hence, the dissident is set down as a trouble-maker if not a subversive, and his career in the hierarchy is side-tracked, often permanently. In the meanwhile, the envoys or foreign service people who assure the President "things are going very well in Croatia," are hailed as perceptive fellows and their careers are advanced. And then, if years later, the dissident is proved correct, and the Croatian policy lies in shambles, is the president or any other ruler likely to turn in warm gratitude to the former dissident? Not hardly. Instead, he will *still* remember the dissident as a troublemaker, and he will not blame his aides, who, along with himself, have been proved wrong. For after all, didn't

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[7] Gordon Tullock, *The Politics of Bureaucracy* (Washington, D.C.: Public Affairs Press, 1965), passim.

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the great mainstream of experts make the same error? How common is sincere soul-searching and repentance for past errors among Presidents or other rulers?

Those bureaucrats who are shrewd analysts of human nature, then, and who understand the way rulers operate, will, if they see that the cherished policy of their President is in grave error, tend to keep their mouths shut, and let some other sucker be the messenger of bad news and get shot down.

Every human activity and institution will tend to reward those who are most able to adapt to the best route to success in that activity. Successful market entrepreneurs will be those who can best anticipate, and satisfy, consumer demands. Success in the bureaucracy on the contrary, will go to those who are most apt at (a) employing propaganda to persuade their superiors, the legislators, or the public about their great merits; and therefore (b) at understanding that the way to rise is to tell the President and the top bureaucrats what they want to hear. Hence, the higher the ranks of the bureaucracy, the more yes-men and time-servers there will tend to be. The President will often know less about what is going on than those in the lower ranks.

Hence, for example, the phenomenon of President Nixon, thinking he knew more than anyone else about the Vietnam War and yet actually knowing *less* than the astute reader of the *New York Times*. For the CIA and other intelligence warnings of what was going on, developed by many of the lower officers, were screened out by the higher-ups, for being contrary to the President's preferred line, i.e., that all was going well.[8]

The standard explanation of why government grows is that, as time goes on, there is more work for government to do, and that therefore the public's "demand for government" rises. Far more accurate is the view that there is a case of an inverted Say's Law, where supply — or rather the suppliers of government "services", the bureaucracy — themselves constitute the "demand" for their own services, and that they engineer the consent of their superiors, or of the legislature, to provide the wherewithal in the form of increased taxation. Contrast the hilariously satirical, but all too perceptive account of "Parkinson's Law" of bureaucracy. Thus, Professor Parkinson asserted that, in a government bureaucracy, "there need

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[8] This insight into the best success route in government underlies the celebrated Chapter 10, "Why the Worst Get on Top," in F. A. Hayek's *The Road to Serfdom* (Chicago: University of Chicago Press, 1944).

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be little or no relationship between the work to be done and the size of the staff to which it may be assigned."[9] The continuing rise in the total of government employees "would be much the same whether the volume of the work were to increase, diminish, or even disappear."[10] Parkinson identifies two "axiomatic" underlying forces responsible for this growth: (1) "An official wants to multiply subordinates, not rivals"; and (2) "Officials make work for each other."

Parkinson begins his "model" with an official who feels himself overworked. The official could resign, but that is unthinkable; besides, he would lose his pension rights. To ask to divide his work in half with a new colleague on his own level is equally unthinkable; for his status would be cut, and he would bring in a dangerous rival for the job of his own boss when the latter retires. He could ask for one assistant under him; but that would be dangerous, because the new man might achieve something like equal status with himself. No, his preferred route is to ask for *two* assistants, who could then compete with each other for his favor; pretty soon, each of these new assistants will complain of overwork, and each one of these will get two assistants. The original bureaucrat now has the satisfaction of having six men under him, and he is now ready for a promotion and a substantial raise in pay.

But how about the work to be done? Won't the original quantity of work be divided into seven parts, and won't each man now be absurdly and manifestly idle and under worked? No — and here is one of Parkinson's scintillating insights into the theory of bureaucracy — for one aspect of Parkinson's Law is that "work expands so as to fill the time available for its completion." Or, as Parkinson also puts it: "The thing to be done swells in importance and complexity in direct ratio with the time to be spent."[11] Here

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[9] C. Northcote Parkinson, *Parkinson's Law* (Cambridge, MA: Houghton Mifflin, 1957), p. 2.

[10] *Ibid.*, p. 4.

[11] Parkinson's Law applies in daily life as well as to government bureaucracy. "Thus, an elderly lady of leisure can spend the entire day in writing and dispatching a postcard to her niece . . . An hour will be spent in finding the post, another in hunting for spectacles, half an hour in a search for the address, an hour and a quarter in composition, and twenty minutes in deciding whether or not to take an umbrella when going to the mailbox in the next street. The total effort that would occupy a busy man for three minutes all told may in this

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enters the second aspect of Parkinson's Law of Growth: that "officials make work for each other." For, says Parkinson, "these seven make so much work for each other that all are fully occupied", and the original man "is actually working harder than ever." Documents have to be sent to each man in turn, each has to comment on the document and send the comments to everyone else, they all have to confer on the document and the various amendments proposed, and the original man is now also wrapped up in problems of inter-personal relations between himself and his staff, and of each of his staff amongst the others. Finally, after a lengthy process of interaction, writes Parkinson, the original official produces the same reply to the document that he would have written if all his subordinates "had never been born." "Far more people," Parkinson concludes, "have taken far longer to produce the same result. No one has been idle. All have done their best."[12]

Parkinson then illustrates his law with delightful examples from the British Royal Navy. From 1914 to 1928, the number of ships in the Navy fell by 68 percent; the number of officers and men fell by 32 percent. And yet, during the same period, the number of dockyard officials and clerks in the Navy increased by 40 percent, while, even more outrageously, the number of Admiralty officials increased by over 78 percent. The annual rate of increase in the number of Admiralty officials, with little variation, was 5.6 percent. Parkinson takes another example from the British Colonial Office, from 1935 to 1954. In that period, the area and population of colonial territories remained about the same from 1935 to 1939, fell during the war until 1943, rose again until 1947, and then steadily decreased as Britain shed its Empire. And yet, in each of these two decades, the Colonial Office bureaucracy rose steadily in number by about 5.9 percent per year, regardless of what was happening in the scope of the alleged work to be done. Considering then the rate of increase each year in the Admiralty, and averaging the rates of increase of Admiralty and colonial officials, which is not, after all, more outlandish than many other statistical procedures, Parkinson triumphantly concludes that the number of officials will increase by an average of 5.75 percent per year, "irrespective of any variation in the amount of work (if any) to be done."[13]

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fashion leave another person prostrate after a day of doubt, anxiety, and toil." *Ibid.*, p. 2.

[12] *Ibid.*, p. 6.

[13] *Ibid.*, p. 12.

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A similar analysis was set forth earlier, in 1950, in a grievously neglected book by Connecticut attorney and farmer Thomas H. Barber, based on years of inquiry into government and on his observations of Washington bureaucracy during World War II. Barber writes that "there are two requisites for a bureaucrat's promotion, the first, the ability to get and hold votes, the second, the number of subordinates he is able to keep busy." Barber goes on:

> . . . in the Federal Government the pay of a bureaucrat executive is proportioned by Civil Service law to the number of his subordinates. This leads to the rivalry in Washington as each bureaucratic chief tries to increase his "empire." Generally, in order to keep his subordinates busy the boss assumes an air of great importance and affects to be very hurried and under great pressure. He is very punctual at the office and insists that everyone else be. He then deliberately begins to multiply paperwork, calling for reports on any subject connected with his job. He issues enormously complicated orders and memoranda for the organization of his office, requiring that all papers be so routed round that almost every scrap has to be read by everyone in the office and discussed by a number of interlocking committees before it is acted upon. He requires that no paper be thrown away, but all shall be cross-indexed and filed. He has anybody who can be tagged, interviewed, a stenographic report made of the interview and typed (often he has them mimeographed), and circulated to be read and initialed. By these methods it is quite easy to take an amount of work that could be done easily and efficiently by three men and two stenographers, and blow it up so that it can keep from fifty to two hundred people extremely busy, and yet fall far behind in its execution. Thus the uncompleted work gives him an apparently sound excuse for more clerks, who increase his prestige and his pay.[14]

Barber then goes on to relate a delightful example of bureaucracy in action that he had observed during World War II. He notes that there existed a department whose work, "supposing it was worth doing, which is doubtful" could have been done competently by

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[14] Thomas H. Barber, *Where We Are At* (New York: Charles Scribner's Sons, 1950), p. 103.

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about twenty people. It was run, as he puts it, "by a man with a bureaucratic soul." This man asked for written opinions from everyone on all sorts of subjects and had every one read and initial them:

> He was always intensely busy himself, even at night; and he kept constantly increasing his department till he got it up to two hundred men and women. This made him very important. All the two hundred were so busy carrying out his regulations that they were in a constant sweat and confusion, had no time to think, and the essential work in support of the war effort — supposing it was essential — suffered dreadfully. He was rewarded and translated to a more important job.

His successor, Barber related, was a different kind of person; an old gentleman with little ambition and little regard for the taxpayer, but whose objective was to do the essential work, and keep himself and everyone else at the workplace contented. In contrast to the twelve hours a day spent in the office by his predecessor, this man spent only one-half an hour at work each morning. The rest of the day, he walked around the office, talking and joking with the employees, and played golf in the late afternoon. At the end of the first week, says Barber, "he fired about fifty of the two hundred people, apparently at random." As a result, "the work lessened considerably for the remaining ones." There was naturally a lot of discussion of this action, and "it was generally decided that he had fired the fifty he was sure he did not like." "Not a very scientific way of eliminating surplus help," adds Barber, "but it did lighten the work."

The following week, the new boss fired fifty more people, this time apparently dismissing those "he *thought* he did not like." In consequence, "the work for the remainder lightened enormously, though some of the essential work of those dismissed was apportioned around silently by those that remained." A few days later, another fifty people were dismissed, these being the people "he was not sure he did like." Barber notes: "With three-quarters of the force eliminated there was practically nothing left but the 'essential work', such as it was, to do." This work was done effectively in about half of each day by the fifty people remaining, "far more efficiently than it had been done by the original two hundred. The fifty did their stuff and devoted the time remaining — about half of it — to their own concerns."

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Barber concludes that "the old gentleman, being now surrounded only by those he knew he liked, felt he had done enough." He was in the office about an hour a day, and then he evaporated. "The 'work' was far better done than it had been, people had time to think and were not in each other's way." Barber adds that the work probably could have been done by half again of those remaining, but that then the half would "have had to work about as hard as the original two hundred had worked and there would have been no benefit to anyone but the taxpayers."[15]

In addition to this keen treatment of bureaucracy, Thomas Barber was perhaps the first person to arrive at the essence of what is now called "public choice" analysis in the economics profession. Barber notes the "constant tendency for all governments to grow both in size and in authority." Why? Barber answers:

> because the advantage of a big, powerful government, from the point of view of the bureaucrats, is personal, clear and ever-present to their eyes; and because the cost of it, not only in money but in freedom, which is lost by giving authority to officials, is vague and nebulous in the minds of the citizens whose attention is not focused on the government at all . . . . Therefore, since the bureaucrats know exactly what they want and are working for their own immediate interest, and since the other citizens do not realize what they are giving up, and, in fact, have not their attention on the matter at all, it is obvious which group will prevail.[16]

What public choicer has put it better?

III. Limiting Terms of Office in the Original American States

The great Italian sociologist Vilfredo Pareto stressed the importance for society of the "circulation of elites", that elites not become entrenched and solidified.[17] In the market, elites circulate

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[15] *Ibid.*, pp. 103-04.

[16] *Ibid.*, p. 100.

[17] Contrary to accepted myth, Pareto was neither a "fascist" nor any other sort of statist. Pareto was an ardent and brilliantly perceptive laissez-faire libertarian and even anarcho-capitalist who understandably became deeply pessimistic about the future of liberty at the turn of the twentieth century. After that, he retreated

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rapidly and smoothly, in accordance with the most efficient service to meet the desires of consumers. But what of government? In the sphere of government, there is no built-in process for the circulation of elites, and so the natural tendency for the burgeoning, entrenching and rigidifying of bureaucracy tends to prevail.

The Founding Fathers of the American republics — and it is important to stress that thirteen republican polities were founded in the several states years before the possibly misguided leap into the American Constitution — were very much alive to the problem of bureaucracy and of government power. Guided by a blend of libertarian and classical republican thought, they attempted, for the first time in human history, to construct deliberately a new political order in which government power would be decentralized, and be strictly confined to the task of keeping the peace, of insuring domestic tranquillity. The program of at least the dominant libertarian-republican wing of the Founding Fathers consisted of ultra-minimal government: guarding the rights of private property, free markets and free trade, freedom of speech, press and religion, separation of government from money, banking and the economy, allowing neither public debt nor public works, having no standing army but rather relying on popular militia in case of foreign invasion, keeping government revenue and expenditures so low as to be nearly invisible, and generally binding down governmental Power with chains of iron, and watching government like a hawk and with vigilance and deep suspicion, lest it resume its natural tendencies and extend Power beyond its strictest bounds. Nowhere was this more clearly put than in Trenchard & Gordon's *Cato's Letters*, English newspaper articles of the 1720s which were reprinted, bound, and proved highly influential in America throughout the eighteenth century. *Cato's Letters*, which were powerful expressions of libertarian thought, put it this way:

> Only the checks put upon magistrates [government officials] make nations free; and only the want of such checks make them slaves. They are free, where their magistrates are confined within certain bounds set them

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to his ivory tower, from which he wrote bitter and cynical works about the irrationality of human motivations. See in particular, Piero Bucolo, ed., *The Other Pareto* (London: Scholar Press, 1980); S. E. Finer, "Pareto and Pluto-Democracy: the Retreat to Galapagos," *American Political Science Review* 62 (1968), pp. 440-50; and Finer, "Introduction" in Vilfredo Pareto, *Sociological Writings* (ed., by S. Finer, London: Pall Mall Press, 1966).

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> by the people . . . And they are slaves, where the magistrates choose their own rules . . . and therefore most nations in the world are undone, and those nations only who bridle their governors do not wear chains.[18]

How did the libertarian republicans propose to accomplish this program and bind down government? There were two parts to this program. The first was to confine government, for the first time in history, by explicit written constitutions, consisting of severely limited grants of power to the government by the sovereign people, these grants to be strictly, narrowly, and harshly interpreted. Also within those constitutions were explicit bills of rights, warning that government may not transgress against the rights of person and property.

The second and equally essential part of the libertarian-republican program of confining government was to make sure that entrenched oligarchies and bureaucracies would not develop. First, the various powers of government would be separated, and each branch would act as a check upon the others. But more important was a second device which has fallen even more grievously into neglect than the idea of strict construction, bills of rights of person and property, and division of powers. That device was compulsory rotation in office — the idea that in order to keep a bureaucracy and a power elite from becoming entrenched, the terms of office be strictly and severely limited.

Essentially, the founding fathers saw that government lacks the swift and smooth circulation of elites provided by the free market. They saw that the rough analog within government, was giving the public the maximum opportunity to vote out the incumbents, and, in the grand phrase of nineteenth century politics, to "throw the rascals out!" Therefore, the program of what might be called the "classical liberals" of the late eighteenth century, in England as well as in the

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[18] David L. Jacobson, ed., *The English Libertarian Heritage* (Indianapolis, IN: Bobbs-Merrill, 1965), p. 256. In the controversial "Pocock Thesis", J. Pocock sets up an artificial and overblown clash between libertarian and "classical republican" thought, and uses *Cato's Letters* as his definitive reason why the Founding Fathers were influenced by classical republican rather than libertarian ideas. For the definitive demonstration that *Cato's Letters* were decidedly libertarian rather than Pocockian, see Ronald Hamowy, "*Cato's Letters*, John Locke and the Republican Paradigm," *History of Political Thought*, 11 (1990), pp. 273-94.

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new American republics, was frequent (usually annual) elections, and strict limitations upon the terms of office.

It is noteworthy that the current, very popular term-limitation movement for legislators has been denounced for placing fetters on the scope of democratic choice. But that of course was precisely the idea of these libertarian republicans, who were just as aware of the tyranny of majorities as they were of the tyranny of elites, as noted in the case of bills of rights and other constitutional limitations imposed upon government.[19]

Take, for example, the first Pennsylvania constitution, the short-lived radical Constitution of 1776, reviled far and wide as subjecting the state of Pennsylvania to the despotism of its democratically-elected legislature. It is true that in contrast to many other states, Pennsylvania established a unicameral legislature of an elected assembly. The executive was a plural council instead of a single governor, elected in rotation by the assembly, and those positions were revocable at will by the assembly. The executive council had no veto power over the laws of the assembly. Furthermore, the president of this council, elected by joint vote of the council and the assembly, was only the presiding officer of the council with no executive power. Judicial despotism was prevented by the judges not having life terms as in many other states, but by being elected by the council for seven-year terms. Even in Pennsylvania, however, and in contrast both to England and to the colonial American governments, the judiciary was at least partially independent of the executive or the legislature.

Despite the unicameral legislature, the subordination of the executive, and the partial subordination of the judges, however, the Pennsylvania Constitution was scarcely a program for democratic despotism. In the first place, all local officials were to be elected by their communities, and not appointed by the state. Secondly, a comprehensive bill of rights was established in the state constitution to limit the government's power over the people. Third, in a fascinating provision unique to Pennsylvania, a council of censors

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[19] "It is a mistaken notion in government, that the interest of the majority is only to be consulted, since . . . the greater number may sell the less, and divide their estates amongst themselves; and so, instead of a society, where all peaceable men are protected, become a conspiracy of the many against a minority. With as much equity may one man wantonly dispose of all, and violence may be sanctified by mere Power." *English Libertarian Heritage*, pp. 128-29.

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was supposed to meet every seven years to review the actions of the state government in the preceding years and to see whether and where it had exceeded its constitutional powers, from which a new constitutional convention to correct these excesses might be chosen. And fourth, and enforcing severe term limitation, the assemblymen, elected annually, could not serve more than four out of any seven years.[20]

It is both curious and unfortunate that the term-limitation movement has so far been exclusively confined to state and federal legislatures, and has not moved on to include the executive and judicial branches of government. Before the Revolution, the judiciary had never been in the least independent in America. The colonial assemblies themselves exercised judicial functions, and in the seventeenth century the assemblies in Maryland, Virginia, and New England functioned as the supreme judicial arm in their respective colonies. By the eighteenth century, judges were appointed by the Crown and the royal governors, and therefore became an instrument of the British executive power. As part of their struggle for autonomy, the colonial assemblies began to advance the idea of life, or "on good behavior," terms for the higher provincial judiciary, as a means of obtaining some degree of independence for the judiciary from British executive control. The temptation, then, was simply to continue this practice after independence from Britain, even though there was now no British executive to struggle against. Even though the U.S. Constitution established life, or good behavior, terms for the federal judiciary, state judges have generally been popularly elected to a multi-year term.

It is high-time, however, for those interested in checking the growth of centralized national power in Washington, to re-examine the idea of fixed terms for the federal judiciary. A fixed term for Supreme Court justices would reduce the despotic power rapidly accumulating into the hands of the nine absolute and unchecked oligarchs who constitute the Supreme Court of the United States. Not only would such term limits for judges subject the higher federal courts to some sort of check by the public. But, clearly, the hysteria and conflict now surrounding every Supreme Court nomination would be greatly reduced by the knowledge that the public would no longer be stuck with said oligarch for four decades;

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[20] On the Pennsylvania Constitution, see John P. Selsam, *The Pennsylvania Constitution of 1776* (1936).

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a fixed term, say of six or eight years, would mitigate the problem and greatly lower the stakes in each appointment.

IV. The Civil Service vs. Rotation in Office

But the sphere of government that is by far the most entrenched, by far the most insulated, and by far the most expansive, is the one we largely examine in this paper: the bureaucracy of the executive branch. If anger at the legislature has translated into the term-limitation movement, there has been no such channeling of anger into a movement to re-establish the equivalent of term-limitation for the executive branch: rotation-in-office. Such rotation in the executive branch of government is insured by carrying out as fully as possible the idea of "throwing the rascals out" at each change of elected administration. The system of radical change throughout an administration upon its defeat in an election was reversed and increasingly narrowed and marginalized after the adoption of civil service "reform" in the late nineteenth century, a "reform" which has been intensifying and expanding ever since. No system has been more savagely derided by right-thinkers and Establishment do-gooders than the system of rotation in office, pejoratively labeled "the spoils system." Opposition to civil service reform has almost invariably been denounced as merely the voice of corruption and of wicked political "machines." And yet, and despite the fact that the laissez-faire good-government men of the late nineteenth century were fanatically devoted to it, no measure of government has been more destructive of liberty and minimal government than civil service reform. For no measure has entrenched bureaucracy more deeply.

There are two intertwined aspects to this entrenchment, and to the expansion of government as a result of the civil service system. In the first place, the civil servant cannot be removed and replaced by someone else. He enjoys, short of drastic budget cuts and job abolition, lifetime tenure. That entrenches the bureaucracy, and blazes the path for the sort of dysfunctional system outlined by Parkinson, Tullock, and Barber. But there is another, neglected reason why civil service, and its continuing expansion, leads inexorably to the growth as well as the entrenchment of the bureaucracy. Let us say that, in a certain year, incoming Republicans (or Democrats) appoint 10,000 people to political jobs. (They can either attain these posts by kicking out Democrats or by

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adding new jobs.) Before civil service reform, the Democrats, after being elected in their turn, could happily kick out the 10,000 Republican rascals and replace them by deserving Democrats.

But suppose, during this putative Republic term, the Republicans, succumbing to a fit of public-spiritedness and devotion to civil service reform, now expand civil service protection to those 10,000 jobs. Hence, the happy result, which perhaps was not overlooked by the Republicans in their reforming zeal: 10,000 Republicans have now been locked into their jobs permanently, courtesy of civil service "reform." Four years later, when the Democrats return to office, they find that they cannot simply resume their good old ways, eject the rascally 10,000 and replace them by 10,000 good Democrats. To find jobs for these 10,000, they have to *expand* the bureaucracy by 10,000. Later, of course, seized in their turn by a fit of reforming zeal, they expand the civil service reform to these new jobs, thereby freezing 10,000 good Democrats into lifetime appointments. And so, in the sweet-sounding name of removing the bureaucracy from the sordid process of politics, both parties in effect collaborate into fastening both sets of rascals onto the taxpayers permanently. The process, of course, only works by expanding the total number of government jobs.

Or put it another way: regardless of how principled and ideological a political party may be, an essential point of party politics is to find jobs for the faithful of the winning party. If jobs cannot be found, the party system withers and dies, leaving only a self-perpetuating bureaucratic oligarchy behind. A system of minimal government can provide jobs for the winning party by throwing out the jobholders of the losing faction. But if civil service law freezes jobholders in place, the function of providing jobs for the winners can *only* occur by expanding the number of jobs: that is, at the expense of the taxpayers and of the productive, private sector. The "spoils system" allows all the costs to be imposed upon the losing party, and not at all on the body of the taxpayers. Surely a just and admirable system: who better to bear the costs of political defeat than the losing party?

I have only seen this analysis of the propulsive effect of civil service upon the growth of government in the charming little book noted above by Thomas H. Barber. Thus, Barber writes:

> In former days all appointments to the bureaucracy were made by the political party in power. When that party was defeated, all the bureaucrats in office were immediately thrown out and their places were filled by

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> faithful heelers of the victorious party. It was not a very noble system. It was not conducive to efficient governmental administration . . . . It did have certain virtues, however. It prevented anyone from becoming a bureaucrat for life and so losing completely the point of view of the man on the street. It also permitted the elected officials to reward their political workers by *changing*, instead of *increasing*, the bureaucracy.

After the advent of Civil Service reform, on the other hand, "once installed in the bureaucracy ... the incumbent was there for life, or during good behavior." These laws meant that for the elected officials "to reward their political workers, they now had to devise new jobs for them instead of merely turning out the incumbents of the opposing party and filling their jobs. The result, of course, has been a great increase in the number of jobs, and thus in taxes . . ."[21]

Barber adds another highly important point: with the advent of Civil Service reform, the once temporary set of bureaucrats are now converted into a permanent and self-conscious class or caste, set aside from, and in fundamental opposition to, the mass of the citizenry. Until the coming of the Civil Service laws, Barber notes, the bureaucrats had "held their positions temporarily, until a change of party at election threw them back to earn what living they could . . . as ordinary citizens." Before reform, in short, the job holders "had not been a class — merely a group of people temporarily doing the same kind of work." But the Civil Service law "gave them a life tenure of their jobs — welded them into a class." When the class of bureaucrats began to get unpopular with the public, adds Barber, they "very quietly began organizing 'publicity bureaus', that is, propaganda bureaus, to 'educate the public' into believing in the divine wisdom and beneficence of the government (as represented by themselves) in managing everything and everybody." In other words, "the bureaucrats are given a strong incentive to organize and form a powerful bureaucratic lobby."[22]

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[21] Barber, *Where We Are At*, pp. 109-10.
[22] *Ibid.*, pp. 110-11.

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V. The United States Civil Service: The Federalist Beginnings

Elections can only serve as a method of enforced circulation of bureaucratic elites if there exists more than one organized political party. Yet, so demoralized were the Anti-Federalists upon the adoption of the Constitution, and after their decision to accept a Bill of Rights in return for not insisting on a second constitutional convention, that the Federalists were allowed to assume power as a virtually unchallenged party. The Federalists therefore were allowed the scope to staff the nascent bureaucracy with their own conception of the Best and the Brightest — i.e., men of their own party, in contrast to the despised Anti-Federalists or the later Republicans.

Starry-eyed historians have contended that George Washington staffed the administrative bureaucracy with a genuinely non-political and non-partisan array of the Best and the Brightest. Carl Prince has shown, however, that, guided by his distinguished theoretician and organizer Alexander Hamilton, Washington deliberately developed a highly partisan, Federalist party-oriented federal civil service. In the first place, all Anti-Federalists were from the beginning deliberately excluded from office. Secondly, Prince concludes that "the civil service . . . formed a haven for [Federalist] party cadre (party managers at state and local levels), thus virtually professionalizing secondary leadership by individually linking status and pecuniary rewards to the success of the national party." The over two thousand federal office holders named by Washington and Adams in the 1790s constituted the activist middle-class base for the elite leadership of the Federalist party; "partly because of its connection with the first federal service, the new party in most states matured rapidly into a highly professional, tightly knit cluster at the state and local levels, closely aligned with and led by the national leadership at Philadelphia."[23]

Alexander Hamilton was perfectly suited to the role of building up an effective political machine in the civil service. His Treasury department contained three-quarters of the federal employees; and he was able to use that large base to penetrate other departments and to command the loyalty of the U.S. attorneys and judges then

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[23] Carl E. Prince, *The Federalists and the Origins of the U.S. Civil Service* (New York: New York University Press, 1977), pp. x-xi, 2.

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employed in Jefferson's State Department.[24] Even before the end of the Revolutionary War, Hamilton was thinking along similar lines. In arguing for the new idea of having the central government appoint the customs and revenue collectors within each state, instead of allowing the respective states to continue exercising such functions, Hamilton wrote that the reason for such a change would be "to create in the interior of each State, a mass of influence in favor of the Federal Government." In that way, a number of people in each state would be created who would be loyal supporters of the federal government and its increased power. As Hamilton assumed his powerful post at the start of the new Constitutional government, he received congenial advice from prominent Massachusetts merchant Stephen Higginson, one of the leaders of the ultra-High Federalist Essex Junto. Federal officeholders, warned Higginson, must be limited to dedicated Federalists. Toleration of non-Federalists in appointments would "increase the Evil" of opposition to Federalist views: such softness "encourages others to act the same part", and the "number of opposers is by this means generally increased."[25]

The partisan appointment policy under President John Adams was much the same, but much more blatant, and devoid of the insincere protestations of non-partisanship by the first president. As the premier historian of federal administration put it, under Adams "direct reference to party attitude . . . became more common and less concealed."[26] Adams was far more concerned than Washington to direct personally the appointing process throughout his administration. During the second Washington administration, Washington and Hamilton had made sure to exclude members of the new Republican Party from office; and Adams not only continued this policy, but stepped up attempts to root out and summarily remove any Republicans from office. Thus, Adams, in justifying his removal of several Portsmouth, New Hampshire customs collectors from office, wrote the Customs Collector at Boston that the "daily language" of these federal officers was "so evincive of aversion, if not hostility, to the national Constitution and government, that I could not avoid making some changes." Adams concluded that "if the officers of government will not support it,

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[24] *Ibid.*, pp. 6-10.

[25] *Ibid.*, pp. 7-8.

[26] Leonard D. White, *The Federalists: A Study in Administrative History, 1789-1801* (New York: Macmillan, 1948), p. 273.

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who will?"[27] On another occasion, bitter at criticisms by William Duane's radical Jeffersonian Philadelphia *Aurora*, Adams had his Secretary of State pass the word of his displeasure to the U.S. Attorney for Pennsylvania William Rawle, for not cracking down on the *Aurora* for seditious libel. "If Mr. Rawle does not think this paper libelous," thundered the President, "he is not fit for his office; and if he does not prosecute it, he will not do his duty."[28]

The federal civil service during the Federalist administrations consisted of four parts: two, the customs and internal revenue service, were in the Treasury Department, and constituted three-fourths of the total bureaucracy; the post office, inherited from the Confederation days, came under a postmaster-general, who reported directly to the President; and legal and judicial officers, including the Supreme Court, district judges, district attorney, marshals, and court clerks, came under the nominal jurisdiction of the State Department. Apart from the legal and judicial officers, which remained level in number at about 63, all the other wings of the bureaucracy grew rapidly during the Federalist era. Customs officials doubled from 478 in 1792 to 944 at the end of the Federalist period; internal revenue officials, called into existence by the new federal excise tax of 1791, expanded two-and-a-half fold from 219 in 1795 to 533; and the Post Office, which doubled its number of postmasters from 100 at the end of the Confederation period to 200 in 1791, more than quadrupled again to 824 in 1801. The entire bureaucracy increased two-and-a-half fold from the middle of the two Washington Administrations until the end of the Federalist reign.

John Adams as President not only maintained or accelerated the rate of growth of the bureaucracy, and politicized it even more blatantly; he also found ways to expand the politicized civil service into new areas. Thus, in the provisional army that Adams raised at the height of the undeclared war with France in 1798, Adams politicized the leadership by banning the appointment of Republicans from the upper ranks of the army. Also, Congress's enactment of a direct property tax in 1798, allowed Adams to appoint many good Federalists to the new openings at the lower reaches of the tax service. The Republicans charged that the Adams men had concluded that a direct tax "will make Roome for more officers; by

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[27] Prince, *The Federalists*, pp. 11, 45-56.

[28] *Ibid.*, p. 11.

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this time all the yelpers was Nearly put into office with good Salaries."[29]

The federal judiciary, unfortunately, enjoyed from the beginning the life tenure warned against by Thomas Barber, courtesy of the U.S. Constitution. The Federalists had made sure, in Article III, Sect. 1, of the Constitution, that all the federal judges shall hold life tenure on good behavior. The federal judiciary, which then consisted of six Supreme Court justices and twenty-eight district court judges, was thoroughly politicized during the 1790's, the district courts even more than the Supreme Court.[30] Of the twenty-eight, fully three-quarters were partisans of ratification of the Constitution, and even the three doubters eventually supported ratification. Moreover, the bulk of the district judges were fierce Federalist partisans, campaigning for Federalist candidates, denouncing Republicans, and often going so far as making sure of partisan Federalist juries in important cases, such as trials of Republican editors for violation of the Alien and Sedition law. Thus, in one sedition case, Federalist District Court Judge John Lowell of Massachusetts took elaborate steps to make sure of obtaining "one panel of full blooded filtrated federalists, and from them the political verdict."[31] Pennsylvania District Judge Richard Peters took upon himself a personal crusade, during the period of the Alien and Sedition laws from 1798-1800, to root out "Seditious scoundrels." There are "some Rascals," Peters wrote ultra-Federalist Secretary of State Timothy Pickering, "whom he wanted to handle if he could do it legally." One critic noted that it has "become a regular practice of the federal judges to make political discourses to the grand jurors throughout the United States."[32] Overall, Professor Prince justly concludes that "both the first United States district and circuit courts were among the most thoroughly politicized federal judicial institutions in American history . . . . George Washington's 'independence' and 'integrity' and the

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[29] *Ibid.*, p. 12. Also see Manning Dauer, *The Adams Federalists* (Baltimore: Johns Hopkins University Press, 1953), pp. 215-19.

[30] There were no separate appeals judges then, the circuit courts consisting of a blend of district judges and Supreme Court justices.

[31] Prince, *The Federalists*, p. 251.

[32] *Ibid.*, pp. 242, 250.

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obvious threat to constitutional liberties inherent in the situation notwithstanding."[33]

VI. The Failed Jeffersonian Revolution

The Republicans replaced the Federalists in what has justly been called "The Revolution of 1800." Unfortunately, Thomas Jefferson was not really the best man to lead that Revolution. A brilliant libertarian-Republican theoretician before achieving power and after leaving it, Jefferson is a classic case of corruption of principle from being in power. The first Jefferson Administration, however, was certainly one of the finest libertarian moments in the history of the United States. Expenses were lowered, the army and navy were sharply reduced, the bureaucracy was cut, the public debt retired, and the federal excise tax, and the Alien and Sedition Acts, were repealed. In the second term, however, the course was reversed, as Jefferson began expanding government, and gearing up for economic war and eventually military conflict with England.

But even in his libertarian-oriented first term, the militant Republicans — the Jeffersonians — were bitterly disappointed. Jefferson was faced with a critical problem: what to do with the bureaucracy, with the politicized civil service that the Federalists had built up. If Jefferson had followed circulation-of-elites, rotation in office principles, he would have booted out the Federalists and installed good Republicans. But as early as his First Inaugural, Jefferson began to temporize, began to yearn for unity, the healing of wounds, and the rest of the homilies that politicians prattle when they get ready to scuttle the principles which had brought them to their current status. In his First Inaugural, Jefferson assured his listeners that "We are all Republicans; we are all Federalists." Jefferson decided on a middle-of-the road course: to wait until vacancies occur, through death or retirement, and to fill them only with Republicans until they constitute about half of the civil service; and only to remove egregiously anti-Republican officials. Jefferson was particularly angered at the "midnight appointments," that Adams had made at the very last minute before Jefferson took office. During his first two years in office, Jefferson removed the forty major midnight appointments, along with seventy other anti-Republicans in the presidential class of officials, amounting to about

[33] *Ibid.*, pp. 252, 267.

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one-fourth of the major federal officeholders. But that was it: Jefferson removed virtually no one after 1803, and his successors removed very few bureaucrats as well. Madison dismissed only twenty-seven major officials in his eight years in the White House; and Monroe only twenty-seven in his two terms. And even though John Quincy Adams was strongly critical of President Monroe as being "universally indulgent, and scrupulously regardful of individual feelings," and therefore firing virtually no one, Adams himself removed the fewest of all: only twelve in his four years in office.

It's not that the Presidents lacked the legal power to remove office-holders. Indeed, they had the power to remove anyone at will. This power was established, albeit by narrow vote, in the first Congress, the fundamental administrative "Decision of 1789." The most extreme position in opposition was taken by Rep. William L. Smith of South Carolina (who would later change his mind.) Smith, absurdly, but foreshadowing modern labor union and civil service arguments, maintained that the office was "the property" of each bureaucrat, who could therefore only be removed by impeachment and trial for malpractice and improper behavior.[34]

And so, from Jefferson through Adams, the civil service, while theoretically removable at will, by custom and the desire of the successive presidents, had become entrenched and rigidified bureaucracy. Characteristically, it took John Quincy Adams, still a federalist at heart though technically a Republican, to put this custom into stringent ideological terms. Any removal from office except "for cause", i.e. for malfeasance in office, might be politically expedient but it violated Adams's conception of the "public good." Even though it was not ensconced in the law, lifetime tenure on good behavior for the federal bureaucracy had become enshrined in custom for forty years, from 1789 to 1829.[35]

The most important defection of President Jefferson from militant Republican principle was his failure to challenge the entrenched Federalist judiciary. Not only did the judiciary enjoy life tenure under the Constitution; but, at the last minute, and shortly before

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[34] David H. Rosenbloom, *Federal Service and the Constitution: The Development of the Public Employment Relationship* (Ithaca: Cornell University Press, 1971), pp. 26-33; White, *The Federalists*, pp. 20-25.

[35] Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (New York: Macmillan, 1951), pp. 1-15, 347-55, 369-71, and especially pp. 379-81; Rosenbloom, *Federal Service*, pp. 38-44.

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they were forced to leave office, the lame duck Federalist Congress passed the Judiciary Act of 1801, which created six new circuit courts with sixteen quickly appointed Federalist judges; and expanded the jurisdiction of the circuit courts. Moreover, in one of his midnight appointments, President Adams appointed John Marshall of Virginia as Chief Justice of the Supreme Court, a Federalist Chief Justice who would plague libertarian Republicans with his decisions for over three decades.

The radical libertarian, or Old Republican, position was led by Virginians such as John Taylor of Caroline and John Randolph of Roanoke, by Benjamin Austin, leader of Boston's artisans, and by William Duane, editor of the Philadelphia *Aurora*. Many of the Virginia Old Republicans were friends and kinsmen of Jefferson, but they soon realized that their leader was really not one of them, really not prepared to carry forth the "Jeffersonian" Revolution. Steeped in Anti-Federalist hostility to strong central government and self-perpetuating bureaucracy, the Old Republican sought fundamental revolution. Virginia Old Republican William Branch Giles put their judicial program to President Jefferson with clarity and force:

> What concerns us most is the situation of the Judiciary as now organized. . . the Revolution is incomplete, as long as that strong fortress is in possession of the enemy; and it is surely a most singular circumstance that the public sentiment should have forced itself into the Legislative and Executive Department, and that the Judiciary should not only not acknowledge its influence, but should pride itself in resisting its will, under the misapplied idea of "independence" . . . . No remedy is competent to redress the evil system, but an absolute repeal of the whole Judiciary and terminating the present offices and creating a new system, defining the common law doctrine and restraining to the proper Constitutional extent the jurisdiction of the Courts.[36]

In the fall of 1801, the veteran Old Republican, Edmund Pendleton, in his tract, *The Danger Not Over*, proposed constitutional amendments that were soon endorsed by the Virginia legislature. The anti-oligarchic and pro-rotation of office nature of

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[36] Giles to Jefferson, June 1, 1801. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), pp. 20-21.

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these proposed amendments should be clear: the President was to be ineligible for more than one term; the term of Senators was to be reduced; and severe limits were placed on the public debt. As for the federal judiciary, appointments to the courts were to be made by the Congress with no role for the President, and the judges were to be removed at will by a joint vote of House and Senate.

The centrist Republicans, however, men like James Madison, Virginia's Wilson Cary Nicholas, Samuel H. Smith of Maryland, Robert R. Livingston of New York, and Alexander J. Dallas and Albert Gallatin of Pennsylvania, took a very different tack. All of them except Gallatin had favored the adoption of the Constitution, and all of them favored strong central government shorn of Federalist excesses; in short, they were content with the existing system provided that one of their own such as Jefferson was installed in Power. Since they believed that with Jefferson in office, the Revolution was now over, and there was no need for further radical or constitutional change, they favored the Jeffersonian policy of conciliating the Federalist party. At least when he was in power, Jefferson took his stand with the centrists of his party. Hence, his failure to bring about fundamental structural or administrative reform.

Indeed, with victory secured, the centrists now believed that their Old Republican colleagues, not the Federalists, were the main danger. To James Sullivan, Republican Governor of Massachusetts, the Old Republicans were "in opposition to all regular well established governments." They are possessed of a confidence stemming from "a frenzy", and "Having no idea of a solid rational government, they cannot be trusted with power . . ." Virginia Senator Wilson Cary Nicholas also denounced these Old Republicans whose libertarian "bias . . . is strongly against those who rule."[37] To Sullivan, the solution to this problem was "to destroy the lines of party distinctions" — a result that the centrists were finally to achieve in the one-party system during the Monroe and Adams administrations. But the lines of this conflict were blurred by the fact, as Professor Ellis points out, that Jefferson himself, even though a moderate in policy, was generally radically libertarian and Old Republican in rhetoric. Furthermore, unlike the

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[37] *Ibid.*, pp. 23-24.

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centrists, he wanted to reconcile the Old Republicans rather than purge them from the party.[38]

On the judiciary, Jefferson, early in his administration, removed the aggressively Federalist prosecuting attorneys and the marshals who selected the juries and executed the courts' sentences. On the judges themselves, while Jefferson did not try to touch their life tenure, he did manage to repeal the Judiciary Act of 1801 the following year, and thereby to roll back the last minute tide of expansion of Federalist judges.

Jefferson's defection from the principles of rotation in office was the most important event in the entrenching of the combined old Federalist and new Republican bureaucracy. From Jefferson on, the Republican party remained in power, and from Monroe through Adams the United States lived under a one-party state, the Federalists having withered away. With no party competition, there was virtually no pressure for throwing the rascals out.

But in 1820 came what Professor Leonard White, a typical academic enthusiast for a life tenure civil service, called "the cloud on the horizon", the harbinger of the dread "spoils system" wrought by the Jacksonian movement. Secretary of Treasury in the Monroe Administration, William H. Crawford of Georgia, pushed through Congress the Tenure of Office Act, which Monroe came to regret signing, and which was bitterly denounced by all the champions of the entrenched bureaucracy, including Thomas Jefferson. Madison and following him Monroe actually denounced the law as "unconstitutional."

The Tenure of Office Act of May 1820 decreed that all presidential class officials, connected with the collection or disbursement of money, would henceforth serve, not indefinitely, but for fixed terms of four years, after which they would have to be reapproved by the U.S. Senate after being renominated by the President. The covered officials included district attorneys, customs collectors, public land officials and registers, army and navy agents and paymasters. Not affected were postmasters, or any of the accounting and clerical employees. The Tenure of Office Act meant (a) that at least higher bureaucrats would be confronted with fixed terms, and (b) that the power to remove them would no longer be exclusively in the hands of the President, but that the U.S. Senate could share in the removal process.

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[38] *Ibid.*, pp. 29-30.

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The Act came as a shock to the previously contented oligarchy. Jefferson wrote to Madison in horror, charging that the law "saps the constitutional and salutary functions of the President, and introduces a principle of intrigue and corruption . . . This places, every four years, all appointments under their [the Senate's] power . . . It will keep in constant excitement all the hungry cormorants for office, render them, as well as those in place, sycophants to their Senators, engage these in eternal intrigue to turn out one and put in another . . ." There is, of course, another way to look at this law than this frenetic diatribe: that such a system would introduce a bracing wind of competition and of public accountability into the stolid and complacent ranks of the ruling bureaucracy.[39]

It may not be an accident that Secretary Crawford was the author of this bill. A Georgian who was close to the Old Republicans, Crawford, in 1824, was the Presidential candidate of that group as well as of Martin Van Buren, the brilliant political tactician who had been inspired by a weekend with Jefferson at Monticello in May 1824 to spend his life forming a new political party — later to be the Democratic Party — dedicated to taking back America for the old cause, for the libertarian Old Republican ideals of 1776 and 1798.[40] By the election of 1824, Crawford had fallen ill and had little chance for the presidency, but the Old Republican ideals, including that of bringing accountability and rotation of office to the bureaucracy, would go on to be championed by the Jacksonian movement and the Democratic Party forged by Van Buren and others devoted to the Old Republican ideal.

Under President John Quincy Adams, however, the Tenure of Office Act became a dead letter. Adams detested the law: "A more pernicious expedient could scarcely have been devised," and on principle renominated everyone upon his accession to office, and during his term. The Senate was persuaded to go along. So insistent was Adams on life tenure that, when his losing campaign for re-reelection was underway in 1828, he actually renominated

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[39] White, *The Jeffersonians*, p. 388.

[40] On the importance of Van Buren's conversion experience at Monticello, see Robert V. Remini, *Martin Van Buren and the Making of the Democratic Party* (New York: Columbia University Press, 1959), pp. 59-63. On a similar conversion of Thomas Hart Benton of Missouri upon a visit to Monticello on Christmas Eve of the same year, see William N. Chambers, *Old Bullion Benton: Senator from the New West: Thomas Hart Benton, 1782-1858* (Boston: Little, Brown, 1956).

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James R. Pringle for collector of customs at Charleston, even though Pringle was frankly "devoted to the opposition." In his diary, Adams writes that "My system has been, and continues to be, to nominate for reappointment all officers for a term of years whose commissions expire, unless official or moral misconduct is charged and substantiated against them. This does not suit the Falstaff friends who 'follow for the reward' . . . ."[41]

VII. Andrew Jackson and the "Spoils System"

The "spoils system", a derogatory term for rotation in administrative office,[42] was brought to the United States by President Andrew Jackson. Jackson, an ardent Jeffersonian and Old Republican, was, like other Jacksonian leaders, dedicated to a new Democratic Party that would restore original Jeffersonian Republican principles of laissez-faire and ultra-minimal government. Jackson followed Jefferson in managing, for the second and presumably the last time in American history, to repay the national debt; and he and his dedicated successors, Van Buren and Polk, roughly succeeded in establishing hard money and separating the federal government from the banking system, as well as eliminating the protective tariff. Jackson, a wealthy cotton planter and merchant in Nashville, had been energized by corruption in the Monroe administration and by the bank credit collapse in the Panic of 1819.[43] He had served in the House of Representatives and twice in the U.S. Senate.

One of the aspects of government that desperately needed reform, according to Jackson, was the life-tenured bureaucracy. The spoils system had been operating in New York and in Pennsylvania for a

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[41] *Ibid.*, p. 390.

[42] This famous phrase was included in a speech on the floor of the U.S. Senate in January 1832 by New York Jacksonian Democrat William Learned Marcy: "to the victors belong the spoils of the enemy".

[43] On the crucial influence of the Panic of 1819 in converting Andrew Jackson, and future Jacksonian leaders such as President James K. Polk and Thomas Hart ("Old Bullion") Benton, to a hard money, anti-inflationary-bank-credit position, see Murray N. Rothbard, *The Panic of 1819: Reactions and Policies* (New York: Columbia University Press, 1962), pp. 187-89. On the neglected pervasiveness of corruption in the Monroe Administration, and Jackson's response to it, see Robert V. Remini, *Andrew Jackson and the Course of American Freedom, 1822-1832* (New York: Harper & Row, 1981), pp. 12-38.

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number of years, and had been formally incorporated into the Tenure of Office Act. But now Jackson, head of a new incoming party hungry for office, became the first president to sound the trumpet call, and provide an ideological justification for rotation in office. He wanted to change the civil service, as well as to shrink it. In his First Annual Message, Jackson denounced the entrenched bureaucracy:

> There are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties . . . [T]hey are apt to acquire a habit of looking with indifference upon the public interests and of tolerating conduct from which an unpracticed man would revolt. Office is considered a species of property, and government rather as a means of promoting individual interests than as an instrument created solely for the service of the people.

As a result, Jackson went on, government is diverted from "its legitimate end" and made into "an engine for the support of the few at the expense of the many." Jackson then proceeded to attack the idea of special privileged offices to the few, and endorsed an adherence to an extension of the Tenure of Office Act:[44]

> In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another. Offices were not established to give support to particular men at the public expense.

Jackson went on to hone in on the absurd and despotic theory that government officials acquire a property right in the office:

> No individual wrong is, therefore, done by removal [from office], since neither appointment to nor continuance in office is a matter of right ... The proposed limitation [four years] would destroy the idea of property now so generally connected with official station, and although individual distress may be sometimes produced, it would, by promoting that rotation which

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[44] In 1836, such an extension was applied to the postmasters, who then received a four-year term.

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> constitutes a leading principle in the republican creed, give healthful action to the system.[45]

The Whig opposition, as the old, oligarchic, neo-Federalist as well as centrist Republicans now called themselves, lost no time in trying to block Jackson's reform, which threatened the longevity of their own people in office. Daniel Webster, a Federalist turned Whig, thundered that the government agencies, such as the armed forces, the Post Office, the Land Office, or the Customs-house, are "institutions of the country, established for the good of the people," and that therefore it threatened free institutions for these offices to be spoken of as but "the spoils of victory." Stronger in the courts and in the Senate than in the presidency, the Whigs continued to raise constitutional objections to the President's power of removal. But fortunately, the Supreme Court, in *Ex parte Hennen* (1839), its first case on the subject, ruled unequivocally that no government official, even in the federal judiciary below the Supreme Court, had a property right in his office, and that the President or any other statutory authority had the right to dismiss him at will.[46]

Faced with fierce resistance in the Senate, Jackson had to move cautiously, but he succeeded in the heaviest removal rate until that date: during his administration, he removed 252 out of 610 presidential class employees, or over forty-one percent. Including all the lesser federal employees, however, the removal rate was less than twenty percent.[47] Van Buren, his successor and an ardent Jacksonian, had little reason to remove Jacksonian officials. In his last two years in office, he removed 364 postmasters, amounting to

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[45] James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents of the United States, 1789-1897* (Washington: Government Printing Office, 1896), II, 438-39; Ari Hoogenboom, ed., *Spoilsmen and Reformers* (New York: Rand, McNally, 1964), pp. 2-3; Paul P. Van Riper, *History of the United States Civil Service* (Evanston, IL: Row, Peterson, 1958), pp. 30-37; Leonard D. White, *The Jacksonians: A Study in Administrative History* (New York: Macmillan, 1954), pp. 317-21; Rosenbloom, *Federal Service*, pp. 47-50.

[46] *Hennen* was later reinforced on the state level by *Butler v. Pennsylvania* (1850), which held that public employment was not a "contract" within the meaning of Article I, Sect. 10 of the Constitution, which prohibited any state from passing a law "impairing the obligation of contracts." Rosenbloom, *Federal Service*, pp. 52-53.

[47] White, *The Jacksonians*, p. 308. On resistance in the Senate, see Van Riper, *History*, pp. 37-41.

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about three percent of 12,000, to tighten the officialdom a bit for the coming election campaign.

The true test of whether the spoils system would stay was what the Whigs would do when they ousted the Democrats from the Presidency in 1840. Would they stand by their allegedly fiercely-held principles against rotation in office? Or would they succumb to the lure of kicking out the Democrats and replacing them by good Whigs? Fortunately, they abandoned their principles and succumbed to temptation, the Harrison and Tyler Administrations ousting fully fifty percent of the presidential class officials. When James K. Polk returned for the Democrats in 1844, he ousted thirty-seven percent of the presidential class employees, and also managed to appoint, during his four years, 13,500 out of the existing 16,000 postmasters, even though only 1,600 were removed from office while 10,000 filled vacancies caused by resignations. When Zachary Taylor came in for the second Whig administration, he settled the principle of rotation in office, ousting fifty-eight percent of the presidential class officeholders. Indeed, Taylor told his Secretary of the Treasury that "rotation in office, provided good men are appointed, is sound republican doctrine."[48]

In the nineteenth century, especially after the emergence of the Democratic Party, the political parties in the United States were indispensable carriers of furiously clashing ideologies. Every American child or immigrant was socialized into a political party and its ideology, and as a result each American was fiercely loyal to his own party. In most states, elections were very close, and if one's party candidate dared to waffle in his ideological commitment, the party faithful punished him by staying away from the polls. In contrast to the current political scene, where parties have no particular ideology and command no particular loyalty, there were very few floating, independent voters.

By being carriers and instruments of a party ideology, the political parties in nineteenth century America were the vitally important means by which ideology could dominate the narrow clash of special interest groups and seekers after government subsidies and privilege. The disappearance of ideological parties, starting in 1896, brought about the weak and fuzzy party politics we are familiar with today.

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[48] White, *The Jacksonians*, pp. 309-13.

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It is clear that clashing ideological parties would be more willing to throw the rascals out, since they really believed that their opponents were rascals. The spoils system added the healthy incentive of occupying the offices for one's own party, so that party self-interest could be wedded to the pursuit of ideology. Both common party ideologies and the spoils system kept the political party system healthy and flourishing. What everyone now laments as the anemia and near-death of party organization and party loyalty was brought about by the twin blows of the demise of the spoils system and the disappearance of a fervently held party ideology.

Writing later, in the 1920s, historian Charles R. Lingley well expressed the importance of the spoils system and its linkage with ideology:

> In the field of actual politics, parties are a necessity and organization is essential. It is the duty of the citizen, therefore, to support the party that stands for right policies and to adhere closely to its official organization. Loyalty should be rewarded by positions within the gift of the party; and disloyalty should be looked upon as politician treason.

Lingley adds that anyone who votes for other than party organization candidates and who "feels himself superior to the party" is "faithless to the great ideal." And he

> is only a little less despicable than he who, having been elected to an office through the energy and devotion of the party workers, is then so ungrateful as to refuse to appoint the workers to positions within his gift. Positions constitute the cohesive force that holds the organization intact.[49]

In a thoughtful essay lamenting the demise of the spoils system as an important democratic check upon the growth and arrogance of bureaucracy, Professor Fred W. Riggs, an expert in Comparative Public Administration, first points to the untrammeled bureaucracy of Oriental Despotism, and of other examples where bureaucracy sped forward beyond any checks of competing political parties. He then goes on to point out that the much heralded "merit system" of promotion within a life-tenured bureaucracy, "cuts at the root of one of the strongest props of a nascent political party system, namely spoils." In the United States, "the spoils system played an

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[49] Charles R. Lingley, *Since the Civil War* (New York: The Century Co., 1924), p. 118; quoted in Van Riper, *History*, p. 61.

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important part in galvanizing the parties into action." While often seemingly more efficient in their tasks, Riggs points out, "the career bureaucracy can project greater political power on its own, resist more successfully the politician's attempts to assert effective control. What is lost in administrative efficiency through spoils may be gained in political development, especially if party patronage can also be used as a lever to gain control over administration." And even the edge in efficiency, notes Riggs, is often illusory:

> Without firm political guidance, bureaucrats have weak incentives to provide good service, whatever their formal, pre-entry training and professional qualifications. They tend to use their effective control to safeguard their expedient bureaucratic interests — tenure, seniority rights, fringe benefits, toleration of poor performance, the right to violate official norms — rather than to advance the achievement of program goals.[50]

VIII. The Johnson Administration and the Advent of "Reform"

When the Democrats returned to power in 1853, the Pierce Administration summarily removed approximately 89 percent of the Whig presidential class appointees. But the most massive employment of the spoils system came with the Lincoln Administration, when the Republican Party came to power for the first time. Of the 1,520 presidential class appointees existing in 1859, Lincoln removed no less than 1,457, or 96 percent. Employees who were in subordinate categories, who usually fared better during removals, this time suffered to the same degree. Even military appointments were now made on a largely partisan basis.[51]

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[50] Fred W. Riggs, "Bureaucrats and Political Development: A Paradoxical View," in Joseph LaPalombara, ed., *Bureaucracy and Political Development* (Princeton: Princeton University Press, 1963), pp. 128-29.

[51] Perhaps the most egregious of Lincoln's military appointments was that of General Grenville M. Dodge. Dodge, an Iowa political leader and railroad entrepreneur, came to the Republican convention in 1860 to help swing the wavering Iowa delegation to Lincoln. Dodge came at the behest of Lincoln's campaign manager Norman Judd, state chairman of the Illinois party and fellow railroad entrepreneur. In 1862, the Union Pacific Railroad received the first federal transcontinental railroad charter from the federal government, including

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Professor Van Riper, generally an admirer of Abraham Lincoln, concedes:

> From 1861 to 1865 the policy of [George] Washington, selection according to relative capacity and fitness [*sic*], was almost entirely forgotten . . . Lincoln left the bulk of the nominations for presidential as well as for subordinate offices to his political friends and advisors. The military forces as well as the civilian establishment were exploited freely, and political generals were notoriously numerous. With more offices at his disposal than any president up to that time, . . . Lincoln appears to have used — or permitted the use of — the appointing power at his command as deliberately as they could have been used for practical, and usually partisan, political purposes.[52]

Yet, curiously enough, the insufferable self-righteous group of civil service Reformers, many of whom would concentrate the rest of their lives on attacking spoils and calling for life tenure and open

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massive land grant and monetary subsidies. One of the founders of the Union Pacific was Grenville Dodge, who was promptly made a general so that he could take parts of the Union Army and clear out Indians from the prospective path of the Union Pacific.

General Dodge performed this feat under the direction of Acting Secretary and then Secretary of the Interior John Palmer Usher. An Indiana railroad attorney, Usher had been an entrepreneur, just before the Civil War, of the Leavenworth, Pawnee and Western Railroad in the Kansas Territory, and that railroad lobbied heavily and successfully to put Usher into a high post in the Interior Department. The Leavenworth Railroad soon became the Eastern Division of the Union Pacific Railroad. Philip H. Burch, Jr., *Elites in American History, Vol. II: The Civil War to the New Deal* (New York: Holmes & Meier, 1981), pp. 16, 23-24, 48, 54.

Many of the directors of the new Union Pacific had been officers or directors of the connecting Chicago & Rock Island Railroad, of which Norman Judd had been general counsel.

Before his election as President, furthermore, Abraham Lincoln had been a long-time attorney and lobbyist for the powerful Illinois Central Railroad, the leading U.S. railroad before the transcontinental. It is intriguing that his first appointed commander of the Union Army, George B. McClellan, before the Civil War had been chief engineer and vice-president of the Illinois Central, while McClellan's successor, the hapless General Ambrose Burnside, had been treasurer of the Illinois Central just before the war. *Ibid.*, p. 55.

[52] Van Riper, *History*, p. 43. Also see Rosenbloom, *Federal Service*, p. 65.

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examinations on "merit" for the civil service, and who began their agitation at the end of the Lincoln reign, made no complaint whatever at President Lincoln's maximal use of the spoils system. Perhaps the reason was that the reformers, almost all Republicans themselves, benefited hugely from Mr. Lincoln's patronage.

Indeed, the men who would soon become leading reformers reveled in plush positions in the foreign service during the Lincoln Administration. Leading Boston Brahmin patrician, Charles Francis Adams, son of John Quincy, gained the devoted appointment of Minister to the Court of St. James in Great Britain.[53] Boston Brahmin historian, John Lothrop Motely, was selected as minister to Austria. Novelist William Dean Howells became minister to Italy, a payoff for writing a puff campaign biography for Abraham Lincoln. New York's John Bigelow was Consul-General to France, while the man who was to become the leading spokesman for civil service reform, Boston-reared George William Curtis, editor of the influential *Harper's Weekly*, was offered but refused appointment as minister to Egypt. German immigrant Carl Schurz, a leading Republican in the German-American community in Missouri and throughout the Midwest, who helped win the election for Lincoln, was rewarded with the post of Minister to Spain. Restless at being far from the action, Schurz came back to the United States, where he became one of the many lackluster Union generals.[54]

The civil service Reformers were a remarkably homogeneous group. Concentrated almost exclusively in the urban Northeast, including New York City and especially Boston, the Reformers virtually constituted an older, highly educated and articulate elite. From families of old patrician wealth, mercantile and financial rather than coming from new industries, these men despised what they saw as the crass materialism of the *nouveau riche*, as well as their

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[53] Unlike his father and grandfather, Adams was wealthy as well as being a leader of the Brahmin elite. For Adams married the daughter of one of Boston's wealthiest merchants, Peter Chardon Brooks. One son of Adams, John Quincy Adams II, married into the wealthy Crowninshield family, while another, Charles Francis Adams, Jr., was soon to become president of the Union Pacific Railroad. *Ibid.*, p. 24.

[54] Ari Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883* (Urbana, IL: University of Illinois Press, 1968), pp. 21 and passim. Hoogenboom's is the outstanding revisionist history of the civil service reform movement, culminating in the decisive Pendleton Act of 1883.

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lack of good breeding or education at Harvard or Yale. Not only were the Reformers merchants, attorneys, and educators, but they virtually constituted the most influential "media elite" of the day: editors, writers, and scholars. Even though many of them favored laissez-faire in trade and in monetary affairs, they were shaped by the cultural and religious values of their neo-Puritan Yankee culture. In religion, the Reformers were either mainstream post-millennial pietist Protestants, attempting to bring about the Kingdom of God on Earth, or, especially in Boston, Unitarians who secularized in moral terms the quest for the millennial Kingdom. During the 1850s, their moral and religious urge to get rid of slavery, either as frank abolitionists or merely by blocking slavery in the new western states and territories, led all of them into the Radical wing of the Republic Party. Underlying their religious thrust was a coercive Yankee temperament and moral doctrine that had brought the first public schools to the United States long before the rest of the country, in order to inculcate the region's children with the value of obedience to the State as well as in the Protestant religion. In keeping with their religious and moral concerns, their emphasis in civil service reform, from the beginning, was more on morality than efficiency.

For them, such structural changes as life-tenure and competitive open examinations were mere means to an end, their overall goal being to put "good men" into office. And, all too often, those "good men" were simply themselves and their kind.

The civil service reform movement began when Senator Charles Sumner (R., Mass), a Boston Brahmin and a leader of the Radical Republicans, introduced a bill for tenure and open examinations, to be administered by a federal civil service commission. Sumner's bill was introduced in April, 1864, as an expression of some of the Radicals' opposition to the renomination of Abraham Lincoln, whom they considered far too soft on slavery and on the South.[55]

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[55] During and after the Civil War, there were two clashing wings of the Radical faction of the Republican Party. One, headed by Sumner and dominant in New England, favored such laissez-faire economic policies as free trade and hard money. The other, headed by Pennsylvania ironmaster and Representative Thaddeus Stevens, Pennsylvania economist and ironmaster Henry C. Carey, and the Iron and Steel Institute, favored protective tariffs and inflationary greenbacks, to help steel exports and hinder imports, as well as to aid the heavily indebted large railroads. The Stevens wing was soon to become dominant in the Radicals and among the Republicans generally. The Sumner forces were later to become

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The bill was a warning shot across Lincoln's bow, but it got little public support, and Sumner himself did not strongly back the bill, and asked that it be tabled. Sumner had long fulminated against the spoils system, and repeated these charges when he introduced the bill, but, as chairman of the Senate Foreign Relations Committee, he did not hesitate to use his influence to win offices for his friends. Neither did George William Curtis, soon to become the leading champion of reform, scruple to urge his own friends upon Sumner.[56] Still, Sumner was surprised to find his "little bill on the civil service" draw more support than he had expected. Several of the leading newspapers of Washington and New York; several leading academics; Lincoln's Minister to Denmark, Bradford R. Wood, of Albany; William E. Dodge, Jr. of the important metal importers, Phelps, Dodge & Co., who obtained the backing of the Union League Club of New York; and E. B. Ward, Detroit businessman and secretary of the National Manufacturers Association.[57]

Notwithstanding Sumner's abortive effort, the Radicals were basically happy with Lincoln's policies as well as his patronage, and so reform did not really take wing until after the assassination of Lincoln in April, 1865. Vice-President Andrew Johnson was a Union Democrat rather than a Republican, and his moderate policies on Reconstruction deeply angered the Radicals. In December, 1865, Representative Thomas Allen Jenckes (R., RI.), one of the leaders of the Rhode Island bar, made himself the leader of Congressional Reform by introducing a civil service reform bill. Jenckes, a wealthy patent attorney, was in correspondence with British civil service reformers, and he patterned his bill after their program: life tenure on good behavior, open competitive examinations, and a three-man civil service commission to administer the program.

Thomas Jenckes professed to have been converted to reform by his own experience during his Civil War public service, and by

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Liberal Republicans and to lose interest in Reconstruction. See Robert P. Sharkey, *Money, Class and Party: An Economic Study of Civil War and Reconstruction* (Baltimore: Johns Hopkins University Press, 1959).

[56] Hoogenboom, *Outlawing the Spoils*, pp. 10-12.

[57] One of the academic backers of the Sumner bill was the distinguished political theorist Francis Lieber, of Columbia College, who at the same time put in his bid to become one of the federal civil service commissioners. Hoogenboom, *Outlawing the Spoils*, p. 11.

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study of the English system. And yet, his alleged opposition to spoils did not prevent him from wielding a great deal of patronage while in Congress. It seems more likely that his newfound zeal for reform came from the advent of the hated Johnson Administration. Jenckes had been a zealous Radical, but a pro-Lincoln loyalist, and he was now trying to block Johnson from using his own patronage powers to oust the Lincoln Radicals. Indeed, Jenckes was to write one of the articles of President Johnson's impeachment, and narrowly missed being elected by the anti-Johnson Radicals as House manager of the impeachment trial.[58]

During 1866, however, Jenckes's bill only picked up the support of the new and increasingly influential weekly, *The Nation*, a New York periodical founded by young British journalist Edwin Lawrence Godkin, who had emigrated to the U.S. in 1856 and launched *The Nation* in 1865. Inspired by the British model, Godkin devoted the rest of his life to free trade, hard money, and civil service Reform. But most of the soon-to-be reformers had little interest in reform at this point, joining the other Radicals in trying to wrest the patronage power away from the President and into the hands of the Radical-dominated Senate. Johnson attempted to remove the Radicals from executive office, dismissing over one-third of the presidential appointees, over the fierce resistance of the Senate. Finally, in March 1867, Congress passed the Tenure of Office Act over Johnson's veto, providing in unprecedented fashion that the President could not remove any officer — including Cabinet members — without Senate approval. Indeed, it was Johnson's insistence on firing the Radical Edwin M. Stanton as Secretary of War that brought the House to impeach Johnson, and for the Senate to acquit him in his impeachment trial by one vote in May, 1868.

Representative Jenckes resubmitted a reform bill in December 1866, but while it picked up the support of the *New York Times*, Republican, including future reformer, efforts became concentrated on the Senate battle over patronage with the President. On the floor of Congress, Jenckes denounced the spoils system, and held up the example of Prussian bureaucratic efficiency as recently displayed in the Austro-Prussian War. Opposition to reform was led by Vermont

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[58] Hoogenboom, *Outlawing the Spoils*, p. 15. Jenckes was a wealthy patent attorney and manufacturer, whose Rubber Sole Shoe Company was based on his being a patent attorney for Goodyear Rubber, while his American Wood Paper Company used patents to monopolize the production of paper from wood pulp. *Ibid.*, p. 14.

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Republican Frederick E. Woodridge, attorney and railroad builder, who declared that periodic changes of civil service officers are wholesome and democratic, and attacked the Jenckes bill as "anti-democratic." Political changes, Woodbridge declared, "are the great safety-value of the republican form of government ... The health of the nation requires that the stable shall be occasionally cleared out."[59] The proposed Civil Service Commission, Woodbridge charged, would be "this great traveling menagerie, this inquisitorial court." In the vote in the House in early 1861, Radical leader Thaddeus Stevens successfully moved to table the Jenckes bill. The bill lost by a vote of 71 to 67; the Republicans voted 56 to 49 in favor of Reform whereas the Democrats voted 22 to 11 against. The urban East was far more favorable to the Jenckes bill than the rural West, while within New England, the most urbanized states of Massachusetts, Connecticut, Rhode Island, and New Hampshire voted unanimously in favor, while the more rural Maine and Vermont voted totally against.[60]

During 1867, however, increasing reformer disillusion with Johnson, coupled with the passage of the Tenure of Office Act, spurred greater interest in civil service reform. During the fall of 1866, Boston Brahmin Charles Eliot Norton launched a campaign to make his dear friend George W. Curtis, U.S. Senator from New York. When Roscoe Conkling was selected instead, it took the disappointed office-seeker only three weeks to take the plunge and come out for civil service reform — a cause that would occupy him the rest of his life. Reformers were particularly disgusted at President Johnson's having the effrontery to fire one of their own — John Lothrop Motley — as minister to Austria, for being hostile to the Johnson Administration. Charles Sumner, a close friend of Motley's, and Godkin of *The Nation*, were particularly disturbed that Motley would be replaced by Edgar Cowan of Pennsylvania, a man who was not only in favor of Johnson's policies, but who dared to defend the virtues of rotation in office. Taking the typical high moral stance of the civil service reformers, *The Nation* threw down the moral gauntlet to the Johnson Administration:

> Mr. Lincoln . . . put into office the best set of foreign ministers we have had in many a day, and all our representatives at first-class courts for the last six years

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[59] Hoogenboom, *Spoilsmen and Reformers*, p. 21.

[60] Hoogenboom, *Outlawing the Spoils*, p. 31.

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> have been men who were in every sense of the word an honor to the country. . .

But, alas, continued *The Nation*, "they are now being removed one by one to make room for the broken-down adherents of 'the [Johnson] policy,' and if anything can be done to stop the process, stopped it should be."[61]

Reform agitation centered in the Joint Select Committee on Retrenchment in the House, created in July 1866 to curtail government spending. The old Jenckes bill of 1866-67 had been reported out of the Joint Select Committee. In the spring of 1867, the mysterious Julius Bing, an impoverished immigrant who was acquainted with Senator Sumner, received an appointment as clerk of the Joint Select Committee. During 1867-68, Bing worked tirelessly and on all cylinders to promote the cause of civil service reform. Bing wrote no less than twenty articles for the New York weekly *Round Table* from the fall of 1867 to the following spring boosting reform, as well as articles in the *Chicago Tribune*, *Putnam's Magazine*, and a prominent article in the nation's most influential monthly, the *North American Review*, in 1867. In addition, Bing distributed pamphlets to congressmen and editors, lobbied members of Congress, and was Representative Jenckes's right arm in advancing the cause.

In May 1868, Julius Bing prepared and wrote the Jenckes report of the Joint Select Committee on Retrenchment, a massive and comprehensive report which was for many years to serve as the Bible of civil service reform. In addition to including reports on the Chinese, European and English civil service, the report contained replies of several hundred supervisory U.S. officers to the Committee's thirty-seven-point questionnaire. Unsurprisingly, ninety-seven percent of the replies favored reform, i.e. being frozen into life tenure.

Julius Bing's outlook was candidly expressed in his *North American Review* article for October, 1867. "In the early days of the Republic," Bing recalled wistfully, civil service officers as well as the Presidents and the Cabinet, were "generally selected from well-known families." With the advent of the spoils system, however, this aristocratic principle had fallen into disuse, but now, with the Jenckes bill, things would be very different. Andrew

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[61] *The Nation*, IV, No. 82 (Jan. 24, 1867), pp. 61-62. Hoogenboom, *Outlawing the Spoils*, p. 37.

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Johnson, Bing snarled, would not have passed a test by a civil service commission:

> it would not have required a profound psychological knowledge to arrive at the conclusion, that a man may rise from the tailor shop to . . . the gubernatorial chair, and yet be morally and intellectually incapable of presiding . . . over the destinies of a great nation.

Bing's only objection to the Jenckes bill was that it did not go far enough, that it did not apply to the foreign service from top to bottom.[62]

Finally, after a year of frenzied activity, Bing left the center of the reform movement to become Crete's diplomatic agent in the United States.[63]

IX. The Flirtation with Grant

The reformers looked forward with great expectations to the coming Presidency of General U.S. Grant in early 1869. An indisputable Radical, General Grant was a military man, previously uncontaminated by politics, and not beholden to political machines. Surely Grant, who was reputed to favor the Jenckes bill, would see the wisdom of appointing the Best and the Brightest to office? Charles Eliot Norton trumpeted that "'Honesty & Grant,' 'Good Faith & Grant,' must succeed," and Julius Bing wrote to Rep. Jenckes that Grant's imminent election makes "the prospects of our success . . . brighter now than . . . at any previous time."

Grant's installation did not dim the reformers' enthusiasm. Norton burbled that "Grant grows daily in my respect and confidence," and he worshipfully described Grant, as "so simple, so sensible, so strong and so magnanimous." *The Nation* exulted that "we have in Grant a man who will break up the present system."[64]

A crucial aspect of the reformer enthusiasm for Grant was a conviction that they themselves, as clearly the best and brightest, would share in the boodle of the first Republican administration

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[62] *Ibid.*, p. 41, and pp. 42-46. Also see Bing's frenetic attack on the "total depravity" and "total stupidity" of the existing spoils system, in an article in *Putnam's Magazine*, August 1868. Hoogenboom, *Spoilsmen and Reformers*, pp. 12-16.

[63] Hoogenboom, *Outlawing the Spoils*, p. 40n.

[64] Hoogenboom, *Outlawing the Spoils*, pp. 48-49, 51.

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since Lincoln. Particularly active in scrambling for the spoils was none other than the leaders of the reformers, George William Curtis. Asked by his friend Norton to recommend him to Holland or Belgium, Curtis lobbied the new Secretary of State, Hamilton Fish, on Norton's behalf. Curtis also asked Senator Sumner to obtain the nomination of two friends as consuls in France, and he recommended to the patronage post of surveyor for the Albany Customhouse a friend, the poet Alfred Billings Street. In defense of Street, Curtis avowed that the man was not a drunkard, as alleged, but rather was a man "enlivened" by alcohol.

In the meanwhile, the reformers, even *The Nation*, made it clear that competitive examinations were not really an end in themselves, but a means toward the true goal: of filling government posts with the most qualified people. And they were sure who those particularly qualified might be: men very much like themselves.

The Grant Cabinet soon disillusioned the Reformers, however, though not enough to precipitate a break. It turned out that Grant's loose ties with political machines was a mixed blessing, for Grant insisted on selecting wealthy non-party types who had donated ("subscribed") money to his campaign. The reformers began to complain that the President was *too* independent of party, i.e. of themselves. The only satisfying Cabinet appointments by Grant were young ex-Governor Jacob D. Cox of Ohio as Secretary of Interior, and particularly the quintessential Boston Brahmin, Ebenezer Rockwood Hoar, as Attorney General.[65]

The lesser appointments of the President soon confirmed the reformers' disenchantment. Apart from giving the coveted Minister of England post to the Boston Brahmin historian John Lothrop Motley, who had helped write Grant's campaign biography, Grant failed to acknowledge the Best and Brightest status for the reformers. The new Senator from Missouri, Carl Schurz, found to his consternation that the President had selected the postmaster for St. Louis without consulting him, capped by his telling Schurz that "I know Missouri a great deal better than you do." Charles Eliot Norton, finding himself out in the cold on a ministerial appointment, was no longer enchanted with President Grant by July of the president's inaugural year. By then, the reformers were no longer complaining that Grant was insufficiently political; quite the

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[65] Hoar was Supreme Court Justice of Massachusetts, and a member of the Board of Overseers of Harvard College. Burch, *Elites*, pp. 35, 346. Also see Hoogenbloom, *Outlawing the Spoils*, pp. 51-54.

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contrary. Norton wrote his friend, Curtis, of "Grant's surrender . . . to the politicians," who are about to "ruin the country." John Hay, a Boston Brahmin in the career foreign service, wrote angrily about "the herd of swine" whom Secretary of State Hamilton Fish "has commissioned." By late April, the gloomy reformer Henry Adams had washed his hands of the Grant administration:

> My hopes of the new Administration have all been disappointed; it is far inferior to the last. My friends have almost all lost ground instead of gaining it as I hoped. My family is buried politically beyond recovery for years. I am becoming more and more isolated as far as allies go.

Adams wrote to his brother, Charles Francis Adams, Jr., lamenting their common political fate:

> I can't get you an office. The only members of this Government that I have met are mere acquaintances, not friends, and I fancy no request of mine would be likely to call out a gush of sympathy.[66]

Not only were the Adamses, Curtis, Schurz and other reformers disgruntled by Grant's patronage policy, but so too were the media elite: the nation's editors who were peeved at not receiving lucrative appointments. No important editor or publisher was offered a post; and, by mid-April, only Charles A. Dana, editor of the *New York Sun*, was offered the picayune spot of appraiser for New York. All in all, it was easy for the reformers to see, with Julius Bing by mid-April, that Grant had acted "in apparent disregard of the principle of intrinsic fitness and qualification . . ."

If Grant was not to be relied upon, then the reformers must redouble their agitation for a professional civil service with life tenure. Henry Adams, who had not been particularly interested in reform before his disappointment, now plunged into the effort. By February, 1869, Adams had concluded that reform was fundamental, and by June he was writing what he described as a pro-civil service reform article "very bitter and abusive of the Administration." He expected that the article would get him in "hot water," but he felt that the had "nothing to lose." Disappointed in seeking office, the nation's editors stepped up their reform efforts. As Hoogenboom puts it, "Editors, always a vital part of the civil service reform movement, provided the driving force that eventually

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[66] Hoogenboom, *Outlawing the Spoils*, pp. 62-63.

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secured substantial legislation." But these were only the "respectable" editors: *The Nation* bitterly made it clear that the non-respectable press were not interested in reform since they were enough inside politics to get "their own hands and those of their friends into the public treasury."[67]

Stung by their own disappointment, the reformers were incensed when President Grant removed previous officeholders wholesale, and when he made room in the bureaucracy for all the Republican Congressmen defeated in the November elections of 1868. By June, *The Nation* complained that "few people — few of his supporters certainly — were prepared for the 'clean sweep' which he made." The scandals, charged *The Nation*, "have been enormous, and have been deeply felt by the whole community."[68]

In the meanwhile, agitation for the Jenckes Bill, which had escalated after Grant's election in the expectation that the new President would back reform, intensified further now that Grant had let the reformers down. Outgoing Secretary of the Treasury Hugh McCulloch called for the Jenckes bill, and the powerful Union League Club of New York unanimously called for reform. Moreover, in December 1868, the American Social Science Association, founded in Boston a few years earlier to oppose slavery, now added civil service reform to its agenda. German immigrant Henry H. Villard, secretary of the ASSA, and soon to be head of the Northern Pacific Railroad, brought Representative Jenckes in early January to Boston to meet with the society and its influential business and professional supporters. A large audience, including the Board of Trade, and several former mayors of Boston, unanimously signed a petition urging the Jenckes bill. The following week Villard held another meeting for Jenckes in New York, attended by 1,200 enthusiastic businessmen. From that base, Villard spread ASSA organizing for civil service reform to Washington and throughout the country. In June, Villard was able to establish a branch of the ASSA in Philadelphia, centering around the prominent anti-Catholic historian Henry Charles Lea, and fifty of the "best citizens of that city."[69]

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[67] *The Nation*, #200 (April 29, 1869). Hoogenboom, *Outlawing the Spoils*, pp. 63-64.

[68] *Ibid.*, p. 62.

[69] Villard was the son-in-law of the fiery abolitionist leader, William Lloyd Garrison. One of the people whom Villard tapped to head up the Philadelphia branch of the ASSA was the veteran abolitionist James Miller McKim, a

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In October 1869, George William Curtis took the lead of the reformers in addressing the annual meeting of the ASSA in New York, attacking the existing system and calling for the Jenckes bill. *The Nation* hailed the speech and claimed that the public owed a great debt to the ASSA for featuring the talk; it was also impressed by the fact that Curtis, one of the nation's most popular speakers on the lecture circuit, would stump the country for reform.

During the same month, Henry Adams published his "very bitter" article on "Civil Service Reform" in the *North American Review*. Taking the gloves off on Grant, he accused the president of carrying the spoils system to a new extreme. In particular, he pinpointed the politically powerful Civil War (North) veterans group, the Grand Army of the Republic, as aiding Grant in organizing a purge of administrative departments. Adams, however, was a fan neither of competitive examinations nor of the Jenckes bill; he wanted the President to impose civil service reform by executive fiat, and he wanted not so much competitive exams but *permanence* of the administrative oligarchy. Adams betrayed the reformers' overriding motives when he contrasted the alleged magnificence of Attorney-General Ebenezer Hoar with his fellow-Bostonian and Republican, the Radical Secretary of Treasury George S. Boutwell. Whereas Boutwell was a self-made man who rose to prominence, and "was the product of caucuses and party promotion" [Adams' sneer was almost visible], Hoar, coming from one of the top Brahmin families of Boston, was "by birth and by training a representative of the best New England school, indifferent to opposition whether in or out of his party." Adams added that

> Judge Hoar belonged in fact to a class of men who had been gradually driven from politics, but whom it is the hope of reformers to restore. Mr. Boutwell [on the other hand] belonged to the class which has excluded its rival, but which has failed to fill with equal dignity the place it has usurped.[70]

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founder of *The Nation*, and the father-in-law of Villard's brother-in-law, Wendell Phillips Garrison.

[70] Henry Brooks Adams, "Civil Service Reform," *North America Review*, CIX (October 1869), pp. 456-57. Excerpted in Hoogenboom, *Spoilsmen and Reformers*, pp. 25-26. Also see Hoogenboom, *Outlawing the Spoils*, p. 67. It was no wonder that Representative Jacob Benton of New Hampshire denounced the Jenckes bill as a "cunningly devised" scheme to oust the Administration's friends from office "unless they belong to the particular, select favorite class."

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This was a contrast that *The Nation* immediately applauded.

In the meanwhile, the Radical Republicans, coming into power with the Grant Administration, were not about to have their priorities upset. In the first place, with their man in the White House, they rapidly repealed (or amended out of existence) the Tenure of Office Act, which they had passed two years later so that the Radical Senate could take power from Andrew Johnson. With one of their own as president, they rushed to restore the sole presidential power to remove federal appointees from office.

Similarly, with their man in power, the Radicals had now lost their previous enthusiasm for civil service reform. What was the point, now that General Grant, and not an enemy like Johnson, was president? Taking the lead against the Jenckes bill immediately after the 1868 election, for example, was leader Radical Senator John A. ("Black Jack") Logan of Illinois. When the hated Andrew Johnson was in power, Logan, in December 1867, had introduced a civil service reform bill. Now that Grant was president, however, it was a very different story. Logan now denounced reform as unconstitutional, aristocratic, monarchical, anti-republican, and undemocratic. On the contrary, he who does not support an administration should not work in it. As Logan put it, "he who does not unite in its view is not to be intrusted with its employment."

Logan pointed out the importance of rotation in office: "It is by having their agents constantly before them that their acts may be denounced or confirmed that the people maintain their supremacy and enforce their will. This, sir, is the theory and practice of our Government. Immediate responsibility we all incur, and speedy settlements we all must render." Logan concluded that "the right to become for a time a portion of the administrative force of the government is one of the recognized rights of the people of which it is proposed by this bill, utterly and forever, to deprive them."[71]

The Jenckes bill was also effectively attacked by Pennsylvania Democratic Representative George W. Woodward. Harking back to Jacksonian Democracy, Woodward instead called for the Jacksonian virtues of rotation in office, hard money, no excise taxes on industry, free trade, cutting the budget, and repaying the public

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[71] In Leonard D. White, *The Republican Era: 1869-1901: A Study in Administrative History* (New York: Macmillan, 1958), p. 292.

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debt. Rotation in office, Woodward assured, would far more readily assure morality in office than would civil service reform.[72]

The opposition of Logan and other Radicals doomed the Jenckes bill for the duration of the lame-duck 70th Congress; the reformers would try again in the 71st Congress, coming in with the new Grant administration in the spring of 1869. Prospects were dimmed, however, by the fact that the Democrats, doomed to extreme minority status during the Civil War, had made considerable gains in the congressional elections of 1868.

President Grant's first annual message to Congress in December 1869 disappointed the reformers still further, by omitting any call for civil service reform; *The Nation* extravagantly called this omission the "great scandal of General Grant's administration." The reformers were further embittered when their admired Judge Hoar, appointed by President Grant to the Supreme Court, was rejected by the Radical-dominated Senate, angry at Hoar's refusal to tolerate political appointees in the Justice Department.

Jenckes reintroduced his bill in the next Congress, in May 1870. This time, Jenckes threw a sop to the principle of rotation in office, but not to political rotation, by providing that his proposed Civil Service Commission could make civil servants subject to re-examination every four years. Most of the popular support was still confined to the northeast.

While the Jenckes bill languished in Congress, the year 1870 saw a number of body blows administered to the reformers by Grant Administration. Their two beloved leaders in the administration were both summarily fired; Ebenezer Hoar as Attorney General and John Lothrop Motley as minister to England. Both men joined Senator Charles Sumner in opposing President Grant's scheme for the U.S. to annex Santo Domingo, and Hoar in particular was detested by Massachusetts Radical Representative Ben Butler, a champion of the "spoils system" and enemy of reform. Furthermore, the other reformer in the Cabinet, Secretary of Interior Jacob Dolson Cox, was fired by the president, largely for imposing civil service tests and refusing to make political appointments in the Interior Department. Cox, too, ran afoul of the powerful Butler, as

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[72] Hoogenboom, *Outlawing the Spoils*, pp. 57-58.

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well as tangling with Radical Michigan Senator and wealthy Detroit merchant, Zachariah Chandler.[73]

After his dismissal in October, Cox was urged to go public with the reasons by fellow Ohio reformer, Representative James A. Garfield, and the disclosure had the effect of demonstrating increasing disarray in Republican ranks. The ensuing elections of 1870 saw a Democratic gain of thirty seats in the House, as well as the carrying of critical states New York and Indiana. After the election, reform agitation continued, with Yale professors generating a New Haven meeting's "warm letter of sympathy" to Cox, denouncing the existing state of the civil service as "the root of much of our political corruption." Harvard quickly chimed in, a Republican "caucus" in Cambridge unanimously passing a pro-Cox resolution, and a group of young Harvard alumni talked of forming a civil service reform club.

During the election, however, reform lost its stoutest Congressional champion. Thomas A. Jenckes was defeated for reelection by an opponent backed by the powerful Republican Senator William Sprague, a wealthy textile manufacturer, railroad man, and real estate speculator. Having accused Sprague of all manner of corruption and then having lost the election, Jenckes went down howling fraud to the last, charging Sprague with having purchased the winning votes.

The 1870 election, indeed, saw the rise of a new faction within the national party, the Liberal Republicans, calling for free trade but devoted in particular to civil service reform. Carl Schurz bolted the Missouri Republican party, and managed to elect a Liberal Republican as governor. *The Nation* went to the length of calling for a new party devoted to civil service reform, lower tariffs, and, in particular, more representation in government of the "thoughtful, conscientious and intelligent" part of the population, "now excluded from all direct share in the government."

More prophetic was the call of the Bostonian American Free Trade League for an alliance of liberal or reform Republicans and Democrats, an idea seconded in the pro-reformer *Chicago Tribune*. Promptly after the election, the Free Trade League called a

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[73] In another blow to the reformers, one of their leaders, David Ames Wells, from a Massachusetts manufacturing family, was removed from his important post as Commissioner of Revenue by the simple device of allowing his position to lapse. Joseph Dorfman, *The Economic Mind in American Civilization, Vol. III, 1865-1918* (New York: Viking, 1949), p. 11.

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conference for a new alliance in New York. While Schurz, Cox and other Republican leaders refused to commit at this point on breaking with Grant, many leading pro-reform editors were in attendance, including Henry Adams of the *North American Review*, Horace White of the *Chicago Tribune*, and E. L. Godkin of *The Nation*. The conference endorsed both civil service reform and free trade, although Speaker of the House James G. Blaine was able to keep the reformers from calling for a new party by promising to make one of their own, James A. Garfield, chairman of the powerful House Ways and Means Committee. George Curtis also rejected the idea of a new party as insuring the victory of the hated Democrats.

The severe election losses, as well as increasing disaffection from the party by the reformers, caused a shift on the part of the Grant Administration. President Grant, in his annual December, 1870 message to Congress, actually called for civil service reform; the existing patronage system, he said, "does not secure the best men, and often not even fit men, for public place."

During the lame duck session of the 41st Congress, various reform bills, even though approved by President Grant, failed to pass, until congressional reform leaders put through a joint resolution, authorizing the President to appoint a civil service commission to prescribe rules for examining applications. And despite the fact that this resolution was trickily driven through both houses of Congress at the last minute in March as a rider to an appropriation bill, the reformers hailed its passage without commenting on the hasty and devious way that the process was handled.

The Grant Administration's tactic managed to split the reformers. Most reformers, indeed, followed Carl Schurz, Jacob Cox, and E. L. Godkin in forming a powerful Liberal Republican faction dedicated to taking over the Republic Party and denying Grant renomination in 1872. The Liberals challenged the dominant Radicals on every level. Whereas the Radicals were devoted to continuing the Reconstruction of the South, high protective tariffs, continuing greenback inflation, and preserving the spoils system, the Liberals favored conciliating the South and ending Reconstruction now that slavery had been abolished, free trade, and resumption of the gold standard — in short, the platform of the minority Sumner wing of the old Radical faction. But their greatest zeal was not so much for the old laissez-faire creed of the Jacksonian Democracy, but for the doctrine especially detested by that fading group: civil service reform. When Jacob Cox formed his

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Central Republican Association in Cleveland in early 1871, standing on the above program, Carl Schurz cheered him on, stating that this was the creed of his Missouri Liberal Republicans, and calling for similar organizations across the country.

Out of step with most of his colleagues, George W. Curtis was so delighted with the Grant call for reform and with the ensuing Congressional rider, that he hailed Grant and backed his renomination, a conversion toward Grand possibly influenced by Curtis's belief that the President planned to make him Minister to England. Instead, Curtis got another call from the President; responding to the Congressional rider and to charges of corruption in the New York Customhouse, President Grant surprised and delighted reformers in June by appointing a seven-man Civil Service Commission (CSC) , with none other than Curtis as its chairman. The *New York Times*, now a solid Administration organ since Horace Greeley's rival *New York Tribune* was becoming increasingly Liberal, heralded the appointment of the Curtis CSC as offering "practical proof that the President is actively enlisted for reform, and that he has the sense and courage to call to his aid men who are in earnest beyond suspicion."[74]

Curtis succeeded, over the objections of many members of the Commission and over the reluctance of the President, in getting the CSC to promulgate, in mid-December, sweeping rules for all but a small handful of the top officials of the federal administration. He also got President Grant to promulgate the rules on January 1, 1872, to take effect in a mere two weeks. These draconian rules made the CSC the dictator of virtually the entire executive branch, with new entrants into each department coming in almost exclusively at the bottom, with jobholders to be selected by competitive open examination, and promotions from the ranks to be selected in the same way.

The CSC was supposed, however, to divide the civil service into grades, and clearly it was absurd to believe that it could accomplish this task in two weeks. On January 10, therefore, Grant suspended the new rules to give the CSC time to come up with a detailed classification into grades. It did so on March 12, 1872, dividing the entire administration into four classes, with all but the small fourth, or highest, class subject to the rules of examination, and their

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[74] Hoogenboom, *Outlawing the Spoils*, p. 91.

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salaries determined by class. Grant quickly bowed to CSC wishes and promulgated the reform rules.

In a letter to the most reform-minded member of the CSC after Curtis, *Chicago Tribune* publisher Joseph Medill, President Grant came down squarely on the side of reform: "The great defect in the past custom is that executive patronage has come to be regarded as the property of the party in power."[75]

The reformers, however, scarcely paused to celebrate their triumph. They had to battle against a hostile Congress, especially the Grantian Radicals for appropriations and to try to make the Grant rules permanent by statute; and they also arrogantly continued to press the president to extend the rules into the top category, even into those positions that had to be confirmed by the Senate.

In Congress, the Grantian Radicals struck hard. Senator Matthew Carpenter of Wisconsin denounced reform as unconstitutional, transferring the patronage from elected officials to a "board of schoolmasters." Carpenter also perceptively pointed out that not only were the new rules anti-republican, but that they favored the sons of the rich, who could afford a college education, and therefore do better at abstract written examinations than the practical fellow. Carpenter shrewdly identified the underlying class struggle involved in the agitation for and against reform:

> So, sir, it comes to this at last, that . . . the dunce who had been crammed up to a diploma at Yale, and comes fresh from his cramming, will be preferred in all civil service appointments to the ablest, most successful, and most upright business man of the country, who either did not enjoy the benefit of early education, or from whose mind, long engrossed in practical pursuits, the details and niceties of academic knowledge have faded away as the headlands disappear when the mariner bids his native land good night.[76]

A battle ensued in Congress over appropriations for the CSC, which did not feel it could follow its true inclinations in an election year, and it grudgingly voted $25,000 in early May, a severe whittling down from the original proposal of $100,000, or even from the Senate's passage of $50,000. Again, biggest support for the bill was in the northeast, although this time the Grantian Radicals

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[75] Hoogenboom, *Outlawing the Spoils*, p. 106.

[76] White, *The Republican Era*, pp. 293-94.

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were even more opposed to the CSC than were the Democrats. Leading the anti-reform forces in the House, once again, was Massachusetts Representative Ben Butler, while James A. Garfield led the ranks of the reformers.[77]

It was characteristic of the reformers that they repaid President Grant's conversion to their cause by giving him nothing but grief. The bulk of the reformers, determined to destroy the prospects of a second term for Grant, formed a new party, the Liberal Republicans. Meeting under the aegis of Senator Carl Schurz in Missouri in January, 1872, they called for a national convention to meet in Cincinnati on May 1. The idea was to pick a candidate whom the Democrats could also support, and thereby sweep a Democratic-Liberal Republican president into power. Particularly prominent in the new party were the nation's leading media intellectuals — the editors of the most important newspapers. These included Horace Greeley and publisher Whitelaw Reid of the *New York Tribune*, *The Nation*, the New York *Evening Post*, Horace White of the *Chicago Tribune*, Samuel Bowles of the Springfield *Republican*, Mural Halstead of the Cincinnati *Commercial*, and Henry Watterson of the Louisville *Courier-Journal*.

The reformers were anxious to nominate for president one of their very own, Charles Francis Adams, but in order to broaden their base, they were forced to accept delegates not really devoted to reform, who were often simply spoilsmen disgruntled that they had lost out in the battle for President Grant's favor. Such a man was Horace Greeley, who was nominated over Adams and others on the sixth ballot. Greeley's nomination left Schurz, the party's founder, and other reformers embittered. For the elderly Greeley was the opposite of the *beau ideal* of a civil service reformer: a Fourierite socialist and long-time protectionist, Greeley believed that the protective tariff, in contrast to "selfish" laissez-faire individualism, embodied the Christian principle of "universal love." Not only that: but Greeley was really a spoilsman who joined the Liberals because he had backed the wrong Republican faction in New York, from the point of view of the Grant Administration. Carl Schurz was dismayed, writing Greeley frankly that "the first fruit of the great reform, so hopefully begun, was a successful piece of political huckstering and that the whole movement had been captured by

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[77] For excerpts from a witty speech by Butler attacking reform, and the rider put through at the last minute by Senator Lyman Trumbull, a Liberal Republican from Illinois, see Hoogenboom, *Spoilsmen and Reformers*, pp. 26-28.

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politicians of the old stamp." E. L. Godkin was even more upset, writing furiously to Schurz that Greeley was a "conceited, ignorant, half-cracked, obstinate old creature," and charged that Greeley's "election . . . would be a national calamity of the first magnitude . . . the triumph of quackery, charlatanry and recklessness."[78]

The civil service reformers were now split into four mutually quarreling factions. The main camp, headed by Schurz and Horace White, after gaining a commitment by Horace Greeley to civil service reform, swallowed their pride by the end of June and supported Greeley. The second, embittered faction, headed by Godkin and Charles Eliot Norton, went back to support President Grant as the lesser of the two evils. A small group of reformers in late June, detesting both Grant and Greeley, nominated W. S. Groesbeck of Ohio for President, but was not heard from again. And finally, the fourth faction, headed by Curtis, was with Grant from the beginning, remained with Grant, and denounced Greeley with relish. Interestingly, Curtis's letters reveal that his support of Grant was not so much on the civil service question as on his Radical view of reconstruction. Curtis denounced Greeley as too soft on the South, accusing Greeley of being a veritable Copperhead. In the meanwhile, the embattled Democrats, anxious for allies, made the great mistake of nominating Greeley themselves, thereby abandoning all their old principles of Jacksonian Democracy. New York Irish Catholic lawyer Charles O'Conner, a devoted libertarian and Jacksonian Democrat, ran for president on a third, Straight Democratic Party ticket in behalf of the Democracy.

In the 1872 election, Horace Greeley was trounced, losing every state, and he died shortly thereafter. The reformers continued to be split, with the Godkin-Norton faction particularly bitter at those who stuck with Greeley, accusing the latter of selfish and sordid political motives for backing Greeley. After the election, the Schurz-White forces, as true pragmatists, tried to reconcile the factions, but Godkin would have none of it, declaring that "there is at present a slight odor of ridicule hanging around everybody who had anything to do" with the Cincinnati convention. Ideas for a Civil Service Reform League or a daily newspaper in New York devoted to reform faded away.

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[78] Hoogenboom, *Outlawing the Spoils*, p. 114. On Greeley's views, see Joseph Dorfman, *The Economic Mind in American Civilization, 1606-1865, Vol. II* (New York: Viking Press, 1946), pp. 669-71.

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Despite the disarray of the reformers, President Grant continued to be committed to reform, but he reaped only aggravation from George Curtis. In August 1873, Grant agreed to promulgate CSC rules tightening the old regulations, actually making all personal solicitation of appointments by congressmen and others illegal. But Grant wanted some flexibility in the rules for high positions in the administration. After much backing and filling, Grant insisted on naming his own person for the post of surveyor of the customs in New York, technically within the civil service rules but actually always a leading political position confirmable by the Senate. Curtis stubbornly resisted, however, and when illness prevented him from holding a hearing or examination to find someone to fill the post, the president went ahead in mid-March and appointed the prominent politician George H. Sharpe to the post, without notifying Curtis. In a pique Curtis promptly resigned as chairman of the CSC.

Curtis's successor as head of the CSC had impeccable reform credentials. Dorman B. Eaton was a reform intellectual and erudite attorney, born and raised in New England and resident in New York. In 1870, Eaton gave up his flourishing law practice, and spent the rest of his life fighting for municipal and civil service reform, publishing a scholarly history, *Civil Service in Great Britain*, in 1880. It is characteristic of Curtis that he was bitter about Eaton betraying the cause, whereas Eaton felt that Curtis was endangering the reform movement by his precipitous action. In any case, it was Eaton who presided over the tighter rules put forth in August.

But Curtis was not to be appeased; after six months of rest, he was back in the fall of 1873, on the attack in his *Harper's Weekly*, denouncing Grant as not sticking to the "spirit of the rules" by not extending them upward to the important posts of post-masters and collectors of revenue. There is evidence that some of Curtis's bitterness was caused by the thwarting of his ambition for rising in the Grant administration — perhaps his failure to be made Minister to England. For his part, Eaton was willing to conciliate Grant and give up reform rules for collectors and surveyors of ports. Although eventually the reformers would be forced to retreat to this more sensible stance, Godkin's *Nation* attacked Eaton's concession, in the process revealing the true ambitions of reform. It is easy for the President and department heads, the *Nation* wrote, to favor reform, "because it takes disagreeable work off their hands, while as to the more important offices, they are almost openly hostile to the spirit of the innovation, because it takes power away from them." It

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was the top positions that the reformers were mainly interested in conquering and securing, not the jobs of the lowly clerks.[79]

The Radical Republican ranks in Congress were strengthened by the 1972 election, however, and they were ready for the reformers' blood. In addition, the reformers were increasingly distracted by the Panic of 1873, and by the Radicals' demand for monetary inflation to combat a panic that had been brought on by the Civil War and by post-Civil War inflationary expansion of bank credit. Since the reformers were generally hard-money opponents of inflation, the enmity of the Radicals was further redoubled. When President Grant, in his annual message of December 1873, suggested that Congress form a special committee to help the CSC devise enforceable rules, the House responded by naming a committee that featured the inflationist and spoils system champion Ben Butler and that failed to include reform leader James A. Garfield. After a fierce struggle over the existence of the CSC and over its funding, with Ben Butler leading the fight against both, Congress ended by leaving the CSC standing but depriving it of any appropriations.

In the Congressional elections of November 1874, the Democrats, spurred on by the damaging Panic of 1873, won a landslide majority of seventy votes in the House, capturing that body for the first time since the Civil War. The Republican majority in the Senate was reduced to a narrow one. Discouraged by the Democratic victories and by reformer complaints, President Grant finally threw in the towel. In his annual message of December 1874, he continued to endorse civil service reform, but stressed the absurdity of continuing the CSC and the regulations without Congressional funding or support. Grant threatened to abolish the competitive examination system if Congress failed to fund the CSC. Happy to kill the CSC through inaction, the lame duck 43rd Congress failed to appropriate funds, and Grant discontinued the competitive examinations in March 1875. The Civil Service Commission, and the first era of reform rules, 1871-1875, was ended. The reformer flirtation with Grant was over.

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[79] *The Nation*, Vol. XVIII (April 23, 1874), p. 260; cited in Hoogenboom, *Outlawing the Spoils*, p. 129.

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X. The Climax of Reform: The Pendleton Act

The abandonment by President Grant served to mobilize and unify the reformers. In February, 1875, Henry Adams called for a "consultation" of reformers, which was held in the form of a dinner honoring Schurz on his retirement from the Senate. The reformers resolved to unite and avoid the disastrous splits of '72, and they held a general meeting in New York in late April. The reformers concentrated their political fire that year in Ohio, where pro-reformer and hard-money advocate Rutherford B. Hayes managed to topple incumbent inflationist Democratic Governor William Allen. The campaigning for Hayes by Carl Schurz might have made a difference in the close race.

The reformers were also cheered when George W. Curtis was chosen chairman of the New York State Republican convention that year, and when the convention adopted a resolution against a third-term for Grant. And in the Democratic party in New York, pro-reform Samuel Tilden was nominated — and later elected — for governor over Tammany opposition.

The reformers' political attention was now concentrated on the 1876 race. The reformers, now known as Independent Republicans, secretly cherished the pipe-dream of Charles Francis Adams, Sr. being nominated on *both* party tickets — which would have been the climax of their quiet belief in "democracy" guided by themselves. More realistically, they favored the popular Kentuckian Secretary of the Treasury Benjamin H. Bristow; at one point, Henry Adams contemplated buying the New York *Evening Post* as a Bristow organ with Schurz installed as editor. In April, the reformers held a large-scale New York conference at the Fifth Avenue Hotel, in which they made clear that they would avoid the separate party route of 1872, and maintain an Independent stance, waiting to see how the presidential nomination came out. The platform adopted by the conference was written by Schurz, stressing the twin issues of civil service reform and sound currency, meaning a return to the gold standard. The *Nation* exulted that the attendees at the conference were largely the "'moral element' . . . ministers, professors, and respectable persons who do not believe politics should be pursued as a trade."[80]

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[80] Hoogenboom, *Outlawing the Spoils*, p. 139.

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Bristow failed to obtain the nomination at the June convention at Cincinnati, but the reformers were happy with the dark-horse choice, Governor Rutherford B. Hayes, who was committed to reform, to return to gold and to conciliating the South.[81] Hayes had been corresponding with the reformers since February, and after his nomination he wrote happily in his diary: "The best people, many of them heretofore dissatisfied with the Republican party, are especially hearty in my support. I must make it my constant effort to deserve this confidence."[82] And while the reformers were happy to back Hayes, they were also pleased when the Democrats nominated their most ardent reformer, New York's Governor Tilden. Either way, the reformers couldn't lose. In his official letter of acceptance of the nomination in July, Hayes, after consulting with Curtis and Schurz, called strongly for abolition of the spoils system and for a "thorough, radical and complete" reform of the civil service.

As President, Hayes, as we might expect, met with little but complaining from the reformers. During the campaign, the reformers grumbled that Hayes was "waving the bloody shirt" against the "rebels" in his campaign, that he was whipping up anti-Catholic sentiment, and that he was giving campaign posts to opponents of reform. The reformers then complained about Hayes's gaining the presidency from Tilden by evident fraud, and then rewarding the fraudulent election returns-counters from the South with patronage positions. And even though the reformers were delighted that Schurz was named Secretary of the Interior, that he imposed the examination system in his department, and that other reform work was done in the New York Customhouse, nothing, as usual, was enough to satisfy them. Why weren't all the other departments in the hands of the reformers? Also, they found that Hayes was taking the reformers' goal of life tenured appointments *too seriously*; what he was *supposed* to do was to kick out all the

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[81] A major reason for Bristow's being deprived of the nomination was the treachery of his campaign manager, Kentucky attorney John Marshall Harlan. At the crucial last minute, Harlan went over to the Hayes camp. Hayes rewarded Harlan by making him his first Supreme Court appointee, Harlan going on to become the first darling of left-liberals on the Supreme Court. Philip H. Burch, Jr., *Elites in American History: The Civil War to the New Deal* (New York: Holmes & Meier, 1981), p. 105.

[82] Hoogenboom, *Outlawing the Spoils*, pp. 140-41.

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evil Grant people, replace them with good reformers, and *then* freeze the reformers into civil service by reform.

Thus, in June 1877, Horace White wrote in exasperation to Schurz:

> At the beginning, there should have been some heavy & decisive blows at the old system — for instance, the removal of the Collectors at Boston, NY. & Phila. followed by appointments of friends of reform. Known to the country as such, & fostered by unequivocal instructions for all officers & their subordinates.[83]

Poor President Hayes! He just never really got it, although he should have gladdened their hearts by pulling federal troops out of the South and by returning to the gold standard in 1879.

Hayes tried to make up to the reformers by putting the major emphasis on a call for civil service reform in his annual message of late 1879; furthermore, he requested Dorman Eaton, who was still nominally head of the CSC though without office space or funds, to report on the British civil service system, and Eaton was happy to comply, with his paean to the recently-imposed merit and life tenure system in England, *Civil Service in Great Britain* (1880).

The reformers were puzzled about their stance in the 1880 election. When he was nominated, Hayes, in a burst of what the reformers felt was misguided reforming zeal, pledged to be only a one-term candidate. So Hayes, their favorite, took himself out of the race for 1880. The major Republican candidates in 1880 were General Grant, for a third-term, and House Speaker James G. Blaine of Maine. The reformers detested Grant and were unhappy with Blaine, and so they felt it a divine "deliverance" when the June Republican convention at Chicago, after deadlocking between the two leaders, picked pro-reform James A. Garfield as the compromise, anti-Grant candidate. And even though the reformers preferred Garfield to the Democrat choice, General Winfield S. Hancock, they continually complained that Garfield was a waffler, that he now refused to commit to reform, and that he was too close to James Blaine. The reformers grumbled particularly when Garfield chose as Vice-President Chester A. Arthur of the hated New York machine of spoilsman Senator Roscoe Conkling.

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[83] Hoogenboom, *Outlawing the Spoils*, p. 153. As Professor Hoogenboom puts it, "A stable tenure of office was a means not an end in itself, and reformers never meant to apply it to undesirable civil servants as Hayes was doing." *Ibid.*, p. 149.

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The decisive step taken by the reformers during the 1880 campaign was not the election of Garfield, but the establishment of a permanent, single-issue civil service reform organization to agitate for reform. It began in the form of a suggestion in August by the *Nation*, and in a response by Frederick William Holls of New York calling for Independent Republicans to organize a society stressing "education and enlightenment . . . accomplished by agitation, political, social and even religious." Holls suggested that the new society employ the methods which they and their forerunners had used in the struggle for the abolition of slavery: in particular, to seize and stress the high ground of morality and moral principle. Holls urged that the new society put the argument especially on the basis of "abstract moral *right*". Favorable response in letters to the *Nation* inspired the reformers to organize such a society.

In particular, Dorman Eaton had set up a New York Civil Service Reform Association in May, 1877, but the lack of interest had caused the association to remain dormant after 1878. Now, Curtis revived the association, which reorganized in September and October, and named Curtis as its president, a post which he was to continue to hold until his death twelve years later. The association was to be single-issue and non-partisan. It was to specialize in lobbying, in a committee headed by Eaton, and in publishing and distributing publications, in an effort headed by Godkin. The New York association formed the model and the nucleus of other local associations, which sprang up like wildfire: by May 1881, affiliated associations had been established in Brooklyn, Boston, Cambridge, West Newton, Massachusetts, and in Cincinnati, Milwaukee, Philadelphia, Providence and San Francisco, and in the process of formation in Buffalo, New Orleans, Pittsfield and Worcester, Mass. Pamphlets were widely distributed, and in May, a monthly periodical, *The Civil Service Record*, started being published by the Boston and Cambridge associations.

Professor Hoogenboom's study of the forty-five active members of the New York Association's executive committee, from its inception in 1877 until 1883, reveals the following: most members were born within ten years of 1832, making them in their upper forties and lower fifties in 1880; half were attorneys, nine were editors, three professors and five clergymen contributed to the group's high moral tone, and the one-third businessmen were not industrialists but rather upper-middle rank merchants and bankers. Almost all were Protestant; over half were born in New England and the rest in New York. All were Anglophiles. Almost all were highly

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educated, many gaining advanced degrees. Nine attended Harvard College and seven Harvard Law School. The typical New York reform leader was entrenched in blue-blood society, and was a clubman — especially the Union League, Century, University, and Harvard clubs. Patterns were similar in the Brooklyn, Boston and San Francisco Associations.[84]

Finally, on August 11, 1881, the New York Association called a general conference of local associations at Newport, to coordinate agitation and action for reform. Out of this conference came the umbrella national organization, the National Civil Service Reform League, with the executive committee of the New York group functioning as its provisional central committee.[85]

In the lame duck Congress after Garfield's victory, the Democrats began to get increasingly interested in reform. Not only was the idea of reform being spread in the best circles, and becoming more influential among the media and in the electorate, but Democratic losses in the election of 1880 made many of them more enthusiastic about a non-partisan administration. In particular, Senator George Pendleton of Ohio, a recent convert, introduced a civil service reform bill in December. Fortunately for the reformers, the New York Civil Service Reform Association was in place, and when it squawked about technical errors, Pendleton was happy to substitute the bill written by the end of December by the legislative committee of the New York association, i.e. largely by Dorman Eaton.

President Garfield's few months in office proved a grave disappointment to the reformers. He appointed as his Secretary of State the reformers' enemy James G. Blaine, and the new Secretary of the Interior Samuel J. Kirkwood of Iowa promptly dismantled all of Carl Schurz's civil service reforms in that department. Not only that: Garfield's inaugural address, instead of backing the Pendleton bill, cleverly shifted gears by calling for the reform of limiting all officials to a fixed term of years. While to the superficial observer, this proposal seemed similar to the schemes of the reformers, it was precisely the opposite: compelling rotation in office across the board instead of establishing life tenure for high grades in examinations. In private correspondence, George Curtis saw the plan: Garfield, he pointed out, "*knows better* and therefore I can only interpret his

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[84] Hoogenboom, *Outlawing the Spoils*, p. 190-97.
[85] Hoogenboom, *Outlawing the Spoils*, p. 211.

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heretical position to fix on terms of office by law, as an adroit measure to defeat the whole scheme without openly opposing it."[86]

When Garfield was shot on July 2 by the crazed Charles J. Guiteau, James A. Garfield wounded and then dead proved far more of an asset to the reformers than Garfield alive. Guiteau talked himself into believing that he was responsible for Garfield's election, and demanded high office, either Minister to Austria or Consul to Paris. Guiteau has been depicted then and since as a "disappointed office-seeker," and the reformers redoubled their agitation, cynically and demagogically trying to exploit the tragedy — and heedless that the Pendleton Act would not have covered such a position in any case. The idea that murder by an office-seeker can only be combated by abolishing offices to be sought, is even sillier than the comparable argument that the way to eliminate assault or murder is to outlaw guns. From pulpit to press, the reformers pounded away on the spoils system as responsible for the shooting of Garfield, and it was in the wake of that shooting that the New York Civil Service Reform Association decided to go national. In September, the New York association nationally distributed a letter, drawn up by Curtis and signed by many eminent men, from industrialist Peter Cooper to ex-President Hayes, linking the "recent murderous attack" on Garfield with the alleged need for civil service reform.

When Garfield died of his wounds on September 19, the reformers stepped up their propaganda.[87] Forgotten was President Garfield as a weak tool of James Blaine; he was now transformed into a fearless crusader for reform. Typical of Garfield-memorial publications was a poster that the New York association exhibited in every post office in the country. The poster pictured a monument to the murdered Garfield, surrounded by pro-reform quotations from Garfield from his days in Congress, while on the monument was an epitaph proclaiming Garfield "a martyr to the fierceness of factional politics and the victim of that accursed greed for spoils of office which was the bane of his brief conscious existence as President, and is the gravest peril that threatens the future of his country." Henry Adams, to his credit, was disgusted, writing to Godkin that:

> The cynical impudence with which the reformers have tried to manufacture an ideal statesman out of the late

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[86] Hoogenboom, *Outlawing the Spoils*, p. 203-04. Italics are Curtis's.

[87] Van Riper, *History*, pp. 88-91.

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> shady politician beats anything in novel-writing. They are making popular capital. They lie and manoeuvre just like candidates for office. The independents and reformers are as bad as the late lamented, and for the same reason. It pays.[88]

Contrary to the impression given by historians, Congress did not pass the Pendleton Act in direct response to the propaganda centered around the assassination. It is true that media agitation and the civil service associations had their effect, and the Independent bloc was beginning to have a formidable influence on both parties. More and more politicians paid lip-service to reform, and even its great opponent Ben Butler professed to be converted to the cause. But President Arthur, while waffling on the topic, happily proceeded to remove Garfield appointees, and while he (unsuccessfully) asked Congress to restore a $25,000 appropriation to the defunct Civil Service Commission, he also cleverly came out for a four-year limit on all tenure for the bureaucracy — the reverse of the reformers' demands.

The key to the ultimate reformer success and the passage of the Pendleton Act was the course of the 1882 elections. In August 1882, the National Civil Service Reform League held its second annual meeting at Newport. George Curtis vigorously denounced President Arthur for his appointments, and angered by Congress's derisive attitude toward reform, the League decided to become active in the congressional elections, questioning all candidates on specific civil service measures and then publishing their replies. Most state party conventions, as a result, put a pro-reform plank in their platforms, especially in the North and East. When the Maine Republican convention came out against reform, Independent Republicans organized an insurgent ticket demanding reform; as a result, Blaine felt forced to favor reform, at least to the extent of favoring the Arthur four-year plan.

When the New York State Republican convention nominated Secretary of the Treasury Charles J. Folger, a long-time member of the Arthur-Conkling "Stalwart" faction, for governor, the Democrats countered by nominating their leading reformer Grover Cleveland, and the Independent Republicans, headed by Curtis and the Rev. Henry Ward Beecher, advocated bolting the party to vote for Cleveland.

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[88] Adams to Godkin, September 26, 1881. In Hoogenboom, *Outlawing the Spoils*, p. 212.

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The 1882 elections were a terrible blow to the regular Republican forces. Grover Cleveland crushed the Republicans in New York by what was then the largest majority in New York history. The Democrats ousted the Republicans in Ohio, probably because the Republicans insisted on prohibiting liquor and thereby alienating the German Lutherans, who were not about to be deprived of their Sunday beer. But at least an ancillary cause was Arthur's appointment of Stalwart enemies of Garfield in the assassinated President's home state. Regular Republicans also lost by huge majorities in Pennsylvania, Indiana, Connecticut, and New Jersey, and even lost Massachusetts.

After the November elections, then, the heavily-Republican lame duck Congress, having been elected in 1880, faced the future knowing (a) that the successor, 1882 Congress, would be much more Democratic; and (b) that the prospect loomed for a Democratic President in 1884. The regular Republicans, at that point, suddenly heard the call of civil service reform. First, by converting to reform they might keep the Independent votes which they now saw as powerful and even decisive for 1884; and, second, by passing the Pendleton Act they could freeze existing Republicans into life tenure before they would be ousted by an incoming Democratic Administration. On the other hand, the Democrats dared not risk losing the Independent vote by voting against reform, even though it would mean that 10,000 federal office jobs would be locked away from deserving Democrats. The result: both parties made their calculations, and both shifted *en masse* to reform.

President Arthur made the same calculations. In his message in December, he called for prompt passage of the Pendleton bill. Virtually all Congressmen saw the light, and attempts to derail the measure with fixed-tenure in office bills got nowhere. Even Black Jack Logan claimed to have always been a staunch champion of reform. The only rock-ribbed opponent of reform remaining was the veteran Democratic Senator Joseph E. Brown of Georgia. Brown ridiculed the Democrats supporting a bill that would deprive them of the office they would receive in only two years' time. Brown insisted that parties fight for offices as well as principle. The only concession that Brown and the Democrats received was to allow entry into office at all grades of civil service, and not just at the lowest grade, as the Pendleton bill and the reformers had always wanted. The original bill would have meant that promotions could only take place from within the ranks of the bureaucracy, and that there could never be infusions from the outside directly into higher

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ranks. The bureaucracy would then have been far more of a hermetically sealed unit, a rigid, non-circulating, and hierarchical elite. Finally, the Senate voted, or declared, for the amended Pendleton bill by 45 to 12, Republican senators unanimously favoring the bill by 30 to 0, while the Democrats narrowly favored it by 15 to 12.[89] The House followed swiftly. The voters and declarers supported the Pendleton bill by 162 to 48. All but a few Republicans voted in favor, while the Democrat opposition was centered in the South, the Old Northwest, and such states lacking reform associations as New Jersey. In the South, where the reform movement was nonexistent, only 14 Congressmen voted for the measures, 22 opposed, and 26 were absent. Generally, urban areas, where reform movements were strong, supported the bill far more than rural representatives.

Most congressmen, even those voting for the Pendleton bill, detested it. Senator Preston Plumb, Republican from Kansas, who ended up voting for the measure, protested that "we are not legislating on this subject in response to our own judgment . .. but in response to some sort of judgment which has been expressed outside." Indeed, every member of Congress received a letter from the National Civil Service Reform League urging passage of the Pendleton bill, and local associations intensively lobbied their representatives.

President Arthur signed the Pendleton Act of January 16, 1883, and appointed the last CSC chairman, Dorman Eaton, to be the head of the new three-man Civil Service Commission. Civil-service reform was now part of the statutes of the United States. The reformer triumph was not complete, however. The federal government bureaucracy amounted to an average of 140,000 in the 1880s; the Pendleton Act applied its system of examinations, grades and security of tenure to the "classified civil service", which then constituted about 10 percent of the total bureaucracy — largely clerks in Washington, D.C. and in large-city post offices and customhouses employing fifty or more persons. All the rest of the bureaucracy was left an "unclassified service" as before, and subject to patronage and removal. This remaining unclassified service could be brought under the Pendleton regulations if, when, and to the extent that the President saw fit. The only jobs exempt from this presidential authority under the statute were laborers, and those

[89] Southern Democrats voted for the bill by 14 to 12, with Pendleton the only non-southern Democrat to vote in favor. Four Far Western Democrats abstained.

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whose positions were so high as to be subject to confirmation on the advice and consent of the Senate.[90]

XI. After the Pendleton Act

President Arthur surprised and pleased the reformers by applying Pendleton rules strictly; but he disappointed them by not appointing leading reformers to the unclassified positions. In the election of 1884, most of the Independent Republicans deserted the hated Blaine to vote for the Democrat Grover Cleveland for president, earning the label "Mugwumps" from their reform colleague who stuck to the Republicans, young Theodore Roosevelt of New York. Since Cleveland carried New York State, a stronghold of the reformers, by a narrow margin, and this victory was decisive for his election, it is probable that Mugwump support was a key to his triumph.[91] In his annual message to Congress in the December after his election, President Cleveland pledged not only to execute the Pendleton Act faithfully, but also to apply its principles across the entire civil service. The reformers had seemingly reached Nirvana.

But the reform triumph did not turn out as expected. While Cleveland faithfully executed the Pendleton Act to the classified service, he purged all Republicans from the far larger unclassified service. Reformers were bitter, claiming that Cleveland had violated his pledge, and was not carrying out the spirit of reform. Curtis lamented that

> Cleveland's course has left all of us Mugwumps in an apparently disagreeable position . . . . It has certainly discredited civil service reform and chilled those who were his most earnest supporters in 1884.[92]

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[90] The reformers were not ready at that point for the reform rules to be applied to every post in the bureaucracy. Dorman Eaton himself, testifying before the Senate on the Pendleton bill in January 1881, declared that all-at-once application would "be too large altogether . . . We have got to create the machinery . . . you would be utterly overslaughed and broken down if you were to be required to carry it all at once." Van Riper, *History*, p. 105n.

[91] Another well-known critical factor in the New York vote was the denunciation by a leading Protestant minister, the Rev. Samuel Burchard, of the Democratic party as the party of "rum, Romanism, and rebellion" — the reference to rum alienating the German Lutheran swing voters.

[92] Hoogenboom, *Outlawing the Spoils*, p. 261.

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In 1888, reformers were again split; some supported Cleveland grudgingly because of his low-tariff views; but others, including Henry C. Lea of Philadelphia, opposed Cleveland for "betraying the cause [civil service reform] on which he was elected." Cleveland was embittered by this opposition, denouncing Lea as a "base Calumniator" who "ought to be horsewhipped, with the rest of the dirty mendacious gang." Condemning the reformers after losing the election, Cleveland wrote to one of them:

> the treatment I have received from the advocates of Civil Service Reform makes my blood boil . . . . I know what I have done and what I have suffered in this cause and with that I am satisfied as I retire from the struggle. I hope the next man will be better trusted by those who assume to be apostles of the Reform. The cause is worth much — very much; but the people who stand ready to attribute every mistake in the selection of officers to wanton violation of principle and assume to know more of the conditions, motives and intents that those charged with responsibility, are worth nothing.[93]

President Harrison, in turn, gave the reformers short shrift. Harrison made a clean sweep of Democrats in the unclassified service, and failed to reappoint leading reformers in high government positions. Harrison even went further than Cleveland in removing many officials before their fixed four-year terms were up. The reformers complained, by the end of 1890, that in two years of office, Harrison had violated his pledge by not extending the classified service by a single man. When Cleveland returned in 1892, a similar process occurred; Republicans were booted out of unclassified positions. Even one of their very own, Boston Brahmin Josiah Quincy, a founder of the National Civil Service Reform League, was appointed as Assistant Secretary of State; he then promptly fired within a few months one-third of the Republican consular officials and replaced them with Democrats.

Ironically, most of these presidents increased the classified service rapidly. But the reformers were not really delighted at this victory, since what each administration did was to toss out opponents, appoint good party people to unclassified posts, and *then* bring them to the classified service, thereby freezing them into tenure for life. With each alternating shift of party, the merit system

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[93] Cleveland to Silas W. Burt, December 6, 1888. Hoogenboom, *Outlawing the Spoils*, p. 262.

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was thereby extended, ratcheting the number of government officials upward, in order to find room for deserving party workers. As Professor Hoogenboom sums it up:

> the federal classified service increased rapidly. The merit system advanced not because of further action by Congress, but because of executive action. Ironically, executive action stemmed more from a desire to place fellow party members permanently in the civil service than from a wish to reform. The process involved replacing all political enemies with political friends in a branch of the unclassified, or unreformed, service and then extending the rules to cover it. This process was hastened by the alternation of party control in the 1880s and 1890s, which led Presidents every four years to make additions to the classified list. The irony was compounded. The advance of the merit system stimulated rapacious spoils methods in the unclassified service, and the civil service reform movement itself languished.[94]

The reform movement was indeed languishing. Partly this decline was the result of the Pendleton Act victory; but partly, too, because the reformers were getting increasingly obsolete and losing political influence. Membership in the associations declined; the Brooklyn association, for example, lost over half of its members from 1882 to 1890, with the biggest fall off among the former heart of the association: the professionals — the lawyers, clergymen, and journalists. The number of associations also declined. In December, 1883, immediately after the Pendleton victory, there were 59 reform associations in existence; by 1892 however the number had sunk to 35. The San Francisco and New Orleans outposts disappeared, as did those in Louisville and Norfolk. By 1892, the shrinking reform movement was confined to its old Northeastern heartland.

In the 1896 election, William Jennings Bryan was openly anti-reform, and President McKinley, in May 1899, actually withdrew several thousand offices from the Pendleton rules, thereby bringing about "the first backward step in the history of the competitive merit system," and rolling back Cleveland's additions to the classified service. Indeed, the rules might have shrunk further, were it not for

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[94] Hoogenboom, *Outlawing the Spoils*, pp. 260-61.

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another presidential assassination, which catapulted the dedicated reformer Theodore Roosevelt into the presidency. When Roosevelt came into office, 46 percent of the federal bureaucracy was classified; when he left eight years later, he had frozen in Republicans by bringing 66 percent under the rules. The ratchet effect was alive and well, and was continued by successive presidents.

The aging reformers, dwindling in ranks and influence, turned on each other. As early as the first Cleveland Administration, Curtis, Silas Burt and Godkin conspired successfully to persuade Cleveland to oust Dorman Eaton as CSC chairman. They disliked Eaton for his gradualism, but they urged Cleveland to oust Eaton as "impractical, indiscreet, and . . . dangerous."[95]

The disheartened reformers, indeed, looked at the fruits of their victory and found it only ashes. These had been genteel Brahmins and educated elites, convinced of the inherent right of their sort to rule, and embittered at the rise to power of the uneducated, the non-elite, the brash, self-made, *nouveau riche* industrialist. They were also devoted to the ideals of free trade, hard money, laissez-faire, and retrenchment of government, but their chief focus had been a permanent rule by themselves and their cohort. But they lived to see the triumph of their "merit system" result not in the retrenchment of government, but in its acceleration, and not in the triumph of themselves, but of the brash politicians and corruptionists they despised. And in the Progressive era ushered in by Theodore Roosevelt, they were to find the ideals of "merit" and a technocratic elite employed in the service of every principle they detested: big government, protectionism, inflationary bank credit, and imperialism and foreign war.

And so the aging reformers looked on their world and back on their handiwork and found them futile and repellent. A few months before he died in 1892, George W. Curtis expressed his "scorn of the spurious Democracy which is always found in all American parties." Six years later, E. L. Godkin wrote to his old friend Charles Eliot Norton condemning "democracy": "I have pretty much given it up as a contribution to the world's moral progress . . . . I too tremble at the thought of having a large navy and the war-making power, lodged in the hands of such puerile and thoughtless people — 100,000,000 strong. It is an awful prospect for the

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[95] Hoogenboom, *Outlawing the Spoils*, p. 264.

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world, and I am glad to be so near the end of my career." The following year, Godkin wrote in the *Nation* seeing the fundamental problem as big centralized government:

> The great obstacle in the way of reform is neither American nor English, it is simply human. All that we know, by past experience, of the attempts of man to provide himself with a government, makes it most unlikely that an effort, repeated every four years, on the part of one hundred millions of people, to elect a single officer as the chief of state, should succeed. It seemed reasonable enough when the Constitution was framed for 3,000,000 people, leading a simple agricultural life. All democracies of which the world has had any experience, have been small . . . Our desire to create a "world Power" out of the Federal machine is a fiasco, full of shame and disappointment.[96]

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[96] Edwin Lawrence Godkin, "Civil-Service Reform," *The Nation*, LXXI (September 27, 1900), pp. 256-57. Excerpted in Hoogenboom, *Spoilsmen and Reformers*, pp. 49-50.

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SOCIALISM AND 'SOCIAL' JUSTICE

*Antony Flew**

I may, as a result of long endeavors to trace the destructive effect which the invocation of 'social justice' has had on our moral sensitivity, and of again and again finding even eminent thinkers thoughtlessly using the phrase, have become unduly allergic to it, but I have come to feel strongly that the greatest service I can still render to my fellow men would be that I can make... speakers and writers...thoroughly ashamed...to employ the term 'social justice'.

-F.A. Hayek[1]

I

In his Preface to *The Mirage of Social Justice*, Hayek explained how he came to conclude "that the Emperor had no clothes on, that is, that the term 'social justice' was entirely empty and meaningless"[2] and "that the people who habitually employ the phrase simply do not know themselves what they mean by it and just use it as an assertion that a claim is justified without giving a reason for it".[3]

Certainly, as Hayek proceeded so painstakingly to show, this cant expression is usually employed quite thoughtlessly. Few if any of those who habitually employ it have even attempted to produce a systematic and consistent rationale for its application. But this is still not sufficient to show that it is "entirely empty and meaningless". For there is in fact sufficient regularity in the actual usage of the expression 'social justice' to provide it with a meaning, albeit a meaning which is somewhat vague and variable.

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[1] F. A. Hayek, *The Mirage of Social Justice, Vol II, Law, Legislation and Liberty* (London: Routledge and Kegan Paul, 1976), p. 97.
[2] Hayek, *The Mirage of Social Justice*, p. xi.
[3] Hayek, *The Mirage of Social Justice*, p. xi.

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In that meaning it can be defined most illuminatingly as referring to the achievement by extensive statist means of whatever would for socialists be an ideal distribution of goods of all kinds. Following the suggestion made by Hayek in his Preface to the Second Edition of *The Road to Serfdom* — a work dedicated to "The Socialists of All Parties" — the word 'socialism' is here to be understood to mean: "not the nationalization of the means of production and the central economic planning which this made possible and necessary..." but "...the extensive redistribution of incomes through taxation and the institutions of the welfare state".[4]

Consider, for example, quotations from a Fabian Society review of the 1974-9 Labour Party administrations in the United Kingdom (Bosanquet and Townsend 1980). The Editors proclaim "that the Labour Party can and should light a flame in a world of injustice and inequality."[5] Contributor after contributor speaks of "socialist canons of equality and social justice"[6] and of "a more socially just and equal society".[7] One even goes so far as to lay it down — without attempting to explain what this might mean or why we should accept it as true — that, in particular, "Racial equality requires a society which is equal in all respects".[8]

Such identification of inequality with injustice and of equality with social justice have become characteristic of "the socialists of all parties".[9] According to Bosanquet and Townsend, these identifications were manifested in two ways. In the first place, none of the contributors made any attempt to respond to the request of the editors that they should examine and elucidate "the meaning of

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[4] F. A. Hayek, *The Road to Serfdom,* 2nd ed. (London: Routledge and Kegan Paul, 1976), p. viii.

[5] N. Bosanquet & P. Townsend, *Labour and Equality* (London: Heinemann, 1980), preface.

[6] Bosanquet & Townsend, p. 131.

[7] Bosanquet & Townsend, p. 228, also compare p. 67 and p. 227.

[8] Bosanquet & Townsend, p. 151.

[9] Since nowadays this category apparently embraces most spokespersons for the mainstream Christian churches, it becomes noteworthy that Cruden's *Concordance* to the (King James) *Bible* contains no entry at all for either 'inequality' or 'social justice' and only two for 'equality'. These are both to *II Corinthians 14*, which provides no Biblical warrant for these identifications. It is also worth noting that the first employment of the expression 'social justice' recorded in the big *Oxford English Dictionary* is that by John Stuart Mill in *Utilitarianism*(1861).

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equality". In the second place, and perhaps still more significant, the editors failed to demand, and the contributors neglected to offer, any reasons at all either for adopting equality as a value or for concluding themselves entitled or required to impose that value upon others by force. No doubt it appeared to one and all altogether obvious that a just society must be an equal one; if not perhaps, if this is conceivable, "a society which is equal in all respects". For, given the equation between equality and justice, then there would certainly be no need for further justification on either count.

This suggests the reason why Hayek was wrong to maintain "that the people who habitually employ the phrase [social justice] just use it as an assertion that a claim is justified without giving a reason for it." For anyone asserting that some policy is required by a kind of justice is in fact giving what — if but only if their assertion were true — would constitute the best of reasons. The truth, however, is that social justice as customarily conceived is precisely not a kind of justice.[10]

On the contrary, such 'social' justice essentially involves what, by the standards of the old-fashioned, without prefix or suffix, sort of justice must constitute a paradigm case of flagrant injustice; namely, the abstraction under the threat of force (the taxing away) of (some of) the justly acquired property of the better off in order to give it (less, of course, some often substantial service charge) to those whose previous just acquisitions or lack of just acquisitions have left worse off.

It is of the greatest importance to socialists as here conceived thus to maintain that their cherished policies are mandated by a kind of justice. For this enables them to see themselves — and, hopefully, to be seen — as in incontestable occupation of the moral high ground. It thus becomes possible for a spokeswoman for a Labour Opposition to say in all sincerity during a House of Commons debate upon a Queen's speech: "Our complaint against the Government, and in particular the Prime Minister, is that brick by brick they have set out to create an unjust society."[11]

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[10] See, for instance, Antony Flew, "Is "Social Justice" a Kind of Justice?" *Journal des Economistes et des Etudes Humaines,* Vol IV, no 2/3, (June/September, 1993), pp. 281-94.

[11] See *Hansard* for 6/XI/72, 845, 55. The Prime Minister was Edward Heath, whose administration had in fact taken few if any steps to reverse any of the policies of its Labour predecessors.

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Again, it is only on the assumption that Procrustean policies[12] are mandated by a kind of justice that their supporters become equipped with an answer to the objection of those who would ask by what right they are proposing to employ the enforcement machinery of the state in order to realize their own personal vision of the ideal society? If but only if the prescriptions of social justice were indeed mandates of a kind of justice, then the socialists certainly would have a decisive answer to this libertarian objection. For, as Adam Smith so soundly observed in his other masterpiece:

> "The man who barely abstains from violating either the person, or the estate, or the reputation of his neighbours, has, surely, little positive merit. He fulfills, however, all the rules of what is peculiarly called justice, and does everything which his equals can with propriety force him to do, or which they can punish him for not doing".[13]

II

In the Preface to *The Mirage of Social Justice*, Hayek proceeds to explain why he decided not to try "to justify my position vis-a-vis a major recent work", namely "John Rawls *A Theory of Justice*"". It was "because the differences between us seemed more verbal than substantial".[14]

This decision was both somewhat surprising and extremely unfortunate. It was surprising since it was explicitly grounded upon a passage from an article Rawls published much earlier, and to which Hayek himself confessed that he could find no satisfactory parallel in the later book.[15] It was unfortunate, since it ensured that *The Mirage of Social Justice* received far less attention than it should have done, and otherwise would. For although the book of Rawls is misleadingly entitled *A Theory of Justice*, it in fact deals only — or, some might say, alternatively — with "the principles of social justice", principles which, we are told, "provide a way of assigning rights and duties in the basic institutions of society and...define the

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[12] Compare Flew 1981, Ch. I-IV, and Flew 1987, Part II.

[13] Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Press, 1969). This frequently quoted passage comes from the penultimate paragraph of Chapter I of Section II of Part II of this classic that Smith originally published in 1759.

[14] Hayek, *The Mirage of Social Justice*, pp. xii - xiii.

[15] Hayek, *The Mirage of Social Justice*, pp. 100 and 183.

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appropriate distribution of the benefits and burdens of social cooperation".[16]

From the beginning Rawls assumes that social justice thus conceived constitutes the greater part if not the whole of justice, insisting that (unqualified) "Justice is the first virtue of social institutions, as truth is of systems of thought".[17] Later, however, albeit only once and as it were parenthetically, he does at least warn readers not to confuse "The principles of justice for institutions with the principles which apply to individuals and their actions in particular circumstances".[18]

Because this book attempted to satisfy the need for some clear formulation and persuasive rationalization of the putative principles of social justice, it received on its first appearance such a wide and overwhelmingly enthusiastic welcome that it at once became, and has ever since remained, the standard starting point for all subsequent discussion. For instance, in a notably uncritical "Critical Notice", the lifelong socialist Stuart Hampshire wrote:

> I think that this book is the most substantial and interesting contribution to moral philosophy since the war, at least if one thinks only of works written in English. It is a very persuasive book, being very well argued and carefully composed.[19]

It presents, Hampshire continued,

> a noble, coherent, highly abstract picture of the fair society, as social democrats see it...This is certainly the model of social justice that has governed the advocacy of R. H. Tawney and Richard Titmuss and that holds the Labour Party together.[20]

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[16] John Rawls, *A Theory of Justice* (Cambridge Mass and Oxford: Harvard University Press and Clarendon, 1972), p. 4.

[17] Rawls, p. 3.

[18] Rawls, p. 54. Compare this with one successor's surprised statement that "there appears to be a category of 'private justice' which concerns the dealing of a man with his fellows where he is not acting as a participant in one of the major social institutions" (D. Miller, *Social Justice* (Oxford: Clarendon, 1976) p. 17).

[19] Stuart Hampshire, "Critical Notice," *New York Review of Books* (1972, Issue 3).

[20] Hampshire, *ibid.*

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III

What actually holds the Labour Party together as an organization is, surely, the strength of the labour unions, which created it in the beginning and which continue to provide by far the greatest part of its funding. But Hampshire was certainly right to suggest that intellectuals who are social democrats, in the present understanding of the expression,[21] are inspired by some such ideal of social justice. Indeed at the time of writing the Labour Party itself is debating the replacement of its original statement of aim, which demanded "the nationalization of the means of production," with a new statement, which will most likely revolve around the ideal or ideals of equality and social justice conceived as requiring "the extensive redistribution of incomes through taxation and the institutions of the welfare state." For us here the crucial question is whether social justice so conceived is indeed a kind of justice. If we are to answer that question truly we must recall the warning issued by Plato's Socrates: "If I do not know what justice is I am scarcely likely to find out whether it is an excellence, and whether its possessor is happy or not happy."[22]

That was a warning to which Rawls not so much fails as refuses to attend. He never finds room to quote, much less to examine, either some variant of the traditional definition of the word 'justice' or any preferred alternative. Indeed it is only on his five hundred and seventy ninth page that he thinks to explain, without any suggestion of apology, that he was eager "to leave questions of meaning and definition aside and get on with the task of developing a substantive theory of justice."[23]

So what is justice? Among those who have asked themselves this question there seems, at least until comparatively recently, to have been little disagreement.[24] The central, crucial element in their definitions has always been what Plato scripted Polemachus to offer

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[21] It is too rarely remembered that all the European Social-Democratic Parties were originally Marxist, and that even the Bolsheviks began as the allegedly majority faction in the Russian Social-Democratic Labour Party.

[22] Plato, *The Republic,* 354C.

[23] Rawls, p. 579.

[24] Perhaps we need here to distinguish between the concept and conceptions of justice. For, although there seems to have been little disagreement about the concept, there have of course been rival conceptions both of what people's moral and legal deserts and entitlement are and of how these are properly to be determined.

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as his first suggestion: "to render to each their due,"[25] a phrase later translated into Latin as *suum cuique tribuere*. Ulpian prefaced this with two further clauses, making his own definition run: *Honeste vivere, neminem laedere, suum cuique tribuere* [To live honestly, to injure no one, to render to each their own]. The *Institutes* of Justinian proclaim that the mark of a just person is a constant and perpetual resolve to render to each *suum jus* [his right, his own]. That last Latin expression is in such contexts naturally construed as referring to the several and presumably often very different deserts and entitlement of different individuals, the deserts primarily under the criminal and the entitlements under the civil law. These traditional definitions tend to confirm the contention that "To apply the term 'just' to circumstances other than human actions or the rules governing them" — such as the operation of social institutions or the behaviour of some hypostatized Society — "is a category mistake".[26]

Rawls distances his conception of social justice still further from the justice which can and can only characterize the actions of individuals and the general rules governing those actions by his refusal to recognize entitlements which are neither (creditably) deserved nor (discreditably) undeserved. Thus from the premise "that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society" he apparently infers that no one can be morally entitled to anything gained in consequence of enjoying such not-deserved because neither deserved nor undeserved entitlements.[27] But this conclusion is unconscionable. For neither universal human rights, nor individual property rights, nor claims to the legitimate possession and retention of one's own bodily parts are grounded in pretended desert.[28] Rawls, nevertheless, is not prepared to accept the implication that, in as much as social justice is not a variety of traditional, without prefix or suffix justice, the cherishers of this ideal of 'social' justice (a.k.a. the Procrusteans) are as such neither occupants of the moral high ground, nor entitled to draw on the forces of the state to realize their ideal.

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[25] Plato, 331E.

[26] Hayek, *The Mirage of Social Justice*, p. 31.

[27] Rawls, pp. 103-104.

[28] Robert Nozick, *Anarchy, State and Utopia* (New York and Oxford: Basic Press and Blackwell, 1975), pp. 206-207.

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IV

At one point in *A Theory of Justice* Rawls claims that "Throughout the choice between a private-property economy and socialism is left open..."[29] But the hypothetical contracting parties who "in the original position" are to make the hypothetical social contract from which he proposes to derive the fundamental principles of social justice have to take for granted the ultimately collective ownership of all wealth and income. "For simplicity" we are required to "assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, *income and wealth*".[30]

The contracting parties are also conceived as operating behind a veil of ignorance: "...no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and the like".[31] It should be noticed that this prescription is introduced not so much to ensure impartiality but because it supposedly expresses "the result of leaving aside those aspects of the social world that seem arbitrary from a moral point of view".[32]

After the captivating frankness of the confession that "We want to define the original position so that we get the desired solution"[33], and given that the hypothetical contracting parties have therefore been made to assume both that all relevant property is collectively owned and that all individual differences in social situation and personal achievement are morally irrelevant, it should come as no surprise that they cannot but "acknowledge as the first principle of justice one requiring an equal distribution. Indeed, this principle is so obvious that we would expect it anyone immediately."[34]

Nor is it surprising to find that Rawls is no more eager than most other advocates of equality and social justice to settle for an absolute equality of wealth and income. Thus he continues: "If there are inequalities in the basic structure that work to make everyone better off in comparison with the benchmark of initial equality, why not

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[29] Rawls, p. 258.
[30] Rawls, p. 62, emphasis added.
[31] Rawls, p. 137.
[32] Rawls, p. 15.
[33] Rawls, p. 141.
[34] Rawls, pp. 150-151.

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permit them?"[35] Why not indeed, if only we were considering two alternative arrangements both of which were allowed to be morally indifferent? But Rawls has from the beginning himself insisted that "laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are unjust".[36] He might perhaps, had he recognized this difficulty, have tried to wriggle out of it by assuming, somewhat implausibly, that all those who are to be assigned[37] below average incomes would agree to abandon their rights not to be exceeded in return for some suitably substantial additions to the lower income which they would otherwise have enjoyed. For it is a well established legal principle that *volenti non fit injuria*.

Having failed to appreciate this first difficulty, Rawls proceeds by way of salutary remarks about envy to another, which he also fails to recognize. Earlier the pellucidly unequivocal prescription that "social and economic inequalities are to be arranged so that they are...reasonably expected to be to everyone's advantage" was characterized as "ambiguous".[38] Now it is laboriously construed as a formulation of what Rawls calls the Difference Principle: "Inequalities are permissible when they maximize, or a least all contribute to, the long-term expectations of the least fortunate group in society".[39] This unlovely dog-in-the-manger principle simply cannot be derived from what Rawls himself has just proclaimed to be, on his own assumption, the first principle of justice. If that is indeed to be accepted as fundamental and inviolable, and if the desired above average inequalities are to be shown to be at least not unjust, then not only members "of the least fortunate group in society" but also all the others who are to be less than average advantaged will have somehow to be bought off.

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[35] Rawls, p. 151.

[36] Rawls, p. 3.

[37] It is significant that 'assigned' and 'distributed', in an equally active understanding, are both favorite words in *A Theory of Justice*. Any administration proposing to establish a Commission to advise on the control of incomes could confidently seek a suitable Chairman from Harvard.

[38] Rawls, p. 60.

[39] Rawls, p. 151.

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V

Section I, above, drew attention to some of the benefits which socialists derive from pretending that the prescriptions of 'social' justice are the mandates of (unqualified) justice. These benefits are implications carried by that claim. There are, of course, also costs. One of these is rarely noticed. Yet it deserves special emphasis and attention. For if only this implication were to become widely appreciated then there would surely be a much greater reluctance to make claims which carry it.

We have here an occasion for introducing the distinction between justicizing — showing to be just — and justifying. It is certainly possible to justify things which are neither just nor unjust and perhaps possible to justify the unjust.

That said we can, without prejudice to any questions about alternative justifications go on to assert that if compulsory transfers of any of the present wealth or income of the better off to the presently worse off are indeed demanded by justice, then this surely implies that the amounts to be thus compulsorily transferred are not justly possessed by the former but are properly the property of the latter. From that it certainly follows that all those enjoying amounts of wealth and income larger than whatever are allowed to constitute their socially just allocations are necessarily in possession of some — and presumably in many cases much — stolen property and, most shameful of all, property stolen from people worse off than themselves. No doubt there are cases in which people may quite rightly and properly refuse to make any individual voluntary contributions to further some purpose which they are urging ought to be financed by new taxes to be paid by everyone. But the retention by thieves of stolen property until those thieves are forced to surrender their illicit gains is, most emphatically, not one of those cases.

VI

Rawls regularly describes his conception of social justice as "justice as fairness". Fairness as justice would be a more apt description. For the only necessary connection between justice and equality is that the rules of justice, like all rules, apply equally to all

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the cases which satisfy their terms.[40] A system of 'criminal justice' insisting that convicted criminals should be treated exactly as if they had been found not guilty would, as Kant might have said, contradict itself. But suppose that we were charged with making a fair distribution among a particular set of people of some collection of goods which we were entitled and perhaps also required to distribute. The presumption, albeit a defeasible presumption, surely is that a fair distribution would be the one which gave equal shares to all concerned?[41]

Where Rawls goes so radically wrong is in so constructing "the original position" that his hypothetical contracting parties assume that all presently available wealth and income as well as all the wealth and income to be produced in future in their to them presently unknown national territory is their collective property, which they are entitled to distribute at their absolute discretion to different subsets among themselves (and, presumably, their descendants).

All this is simply irrelevant to questions about the justice or injustice of the actual distributions of income and wealth in non-socialist countries. For in such countries most property is presently private, and the always in-principle defeasible presumption must be that this property has been or is being justly acquired. So, if any compulsory transfers are to be not merely justified but justicized, then it will need to be shown not only that the property claims of those from whom some amount is to be taken are to the extent unjust, but also that those to whom these transfers are to be made have just claims to possession of the amounts to be transferred.[42] That would be no easy task. It is one not even attempted by Rawls. He, as we have seen, apparently does not even notice that he is

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[40] Compare, for instance, Antony Flew, *The Politics of Procrustes: Contradictions of Enforced Equality* (London and Buffalo: Temple Smith and Prometheus, 1981), pp. 64 and 67-70.

[41] Compare, for instance, Flew, Chapter III, Section 4.

[42] In the UK the Archbishops' Commission for Urban Priority Areas endorsed a claim by the Bishop of Liverpool that "It is not charity when the powerful help the poor...it is justice", appealing to the Parable of the Good Samaritan for support. But, that parable, as they ought to have known, shows how love (Greek, *agapee*, hence Latin *caritas*, hence old English charity) goes beyond the demands of the law (of justice). The true model for the enforced transfers supported by the Commission is the legendary robber Robin Hood, who stole from the rich and gave (some of) his takings to the poor (Anderson 1992, pp 221-4).

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making this radically socialist assumption of total collective ownership.

VII

The direct compulsory transferring of wealth or income from the better off to the worse off constitutes the most clear-cut and dramatic feature of the conflict between the ideal of 'equality and social justice' and the ethics of a Great Society. But there is also an even more important tendency for the traditional virtues of such a society to be undermined by the institutions of an extensive and comprehensive welfare state.

Suppose, for instance, that educational services for children are provided by a near total state monopoly. Then parents are necessarily deprived both of a choice between schools competing to provide either better service and/or the same service at less cost, and of the responsibility for making such choices in the senses which best suit the needs of their own children. Notoriously such systems tend to serve the interests of their employees rather than of the consumers and, by excluding competition, reduce the chances of reducing the costs and/or of improving the quality of the services provided.[43]

Again, when first a system of compulsory National Insurance and then much later a comprehensive National Health service were introduced in the UK these centralized and comprehensive state systems replaced large numbers of voluntary and private Friendly Societies and Medical Institutes. Of course not everyone who would at some time need the services provided by these institutions had previously been enrolled as a member, although, according to D. G. Green, "By the time the British Government came to introduce compulsory social insurance of 12 million persons under the 1911 National Insurance Act, at least 9 million were covered by registered and unregistered voluntary insurance associations..."[44] Green further states, "The rate of growth of the friendly societies over the preceding thirty years had been accelerating."[45]

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[43] See, for example, Antony Flew, *Shephard's Warning: Setting Schools Back on Course* (London: Adam Smith Institute, 1994).

[44] D. G. Green, *Reinventing Civil Society* (Longon: Institute of Economic Affairs, 1993), pp. 31-32.

[45] Green, *Reinventing Civil Society*, pp 31-32.

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On the other hand, these predecessor institutions had enabled their members to take the responsibility for providing themselves with the relevant benefits and had offered many welcome opportunities in their organization and management for voluntary public service. These responsibilities and these opportunities were removed once the replacement state organization was in place.

The previous voluntary organizations, because they were smaller and because more of their members knew one another, were also better able to discourage and detect fraud: "The Prudential Assurance Company, the largest of the industrial assurance companies, had to abandon sick pay because, as its secretary told the Royal Commission on Friendly Societies in 1873, 'after five years' experience we found we were unable to cope with the fraud that was practised".[46]

VIII

These near-total state monopolies in the provision of all health services and of all educational services for children have both played parts in depriving our people of choices and consequently of responsibilities which our ancestors used to have. But what has probably done most to discourage the virtues appropriate to a Great Society and to promote progressive demoralization is the introduction of systems of tax-financed handouts designed to rectify various perceived deficiencies (a.k.a. inequalities). For consider Charles Murray's Law of Unintended Rewards. This, in the original formulation, reads: "Any social transfer increases the net value of being in the condition that prompted the transfer".[47] This law like the other established laws of economic analysis constitutes a logically necessary truth. For, as Murray goes on to observe, if "A deficiency is observed — too little money, too little food, too little academic achievement — and a social transfer program tries to fill the gap with a welfare payment then the program, however unintentionally, *must* be constructed in such a way that it increases the net value of being in the condition that it seeks to change — either by increasing the rewards or by reducing the penalties".[48]

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[46] Green, *Reinventing Civil Society,* p. 58.

[47] Charles Murray, *Losing Ground: American Social Policy 1950 - 1980* (New York: Basic, 1984), p. 212.

[48] Murray, pp. 212-213, emphasis in the original.

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Where the condition prompting some particular programme is one to which the patients of that condition could not by their own efforts avoid becoming and/or remaining subject there is of course no call to take account of Murray's Law. Indeed the whole point of providing welfare services for, for instance, the blind precisely is to reduce as much as can be the monstrous disvalue of being in a condition into which no one would willingly fall and which all its victims would strive to escape, if only that were possible.

But many, perhaps most, of the conditions unintentionally 'rewarded' by existing state welfare provisions are conditions into which at least some of their victims could and indeed ought to have avoided falling and/or which they could and indeed ought to escape partly or wholly by their own efforts. Insofar as this is the case, such rewards must necessarily tend to weaken both any existing inhibitions against falling into these conditions and any existing incentives to escape them. In the case of many of these conditions this alone should be recognized as a more than sufficient reason as far as possible both to maintain and to strengthen such inhibitions and such incentives.

But the implications and the actual effects of the ideology of equality and social justice are directly contrary. For, necessarily, every handout mandated by social justice is a welfare right.[49] Among those working within the machinery of the welfare state the supreme commandment appears to have become: "Thou shalt not be judgmental."[50] For those people — to borrow the expression employed by General Lee to describe the Union armies — it is in the highest degree politically incorrect to wish to distinguish the deserving from the undeserving poor. All welfare payments and services are considered to be owed as of right, and to generate no

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[49] In the present century, the century of the rise of that ideology, the Universal, European and other Declarations of Human Rights have all included welfare as well as option rights. Option rights, like those of the American Declaration of Independence, are the rights of individuals to be left to their own devices, provided only that they respect the equal rights of others. Welfare rights are rights to be provided with some good, necessarily at the expanse of others and presumably by the appropriate welfare state. See, for example, Antony Flew, *Equality in Liberty and Justice* (London and New York: Routledge, 1989), Chapter 2.

[50] Compare, for instance, N. Dennis and G. Erdos, "Thou Shalt Not Commit a Value Judgement", Chapter 3 of *Families Without Fatherhood* (London: Institute of Economic Affairs, 1992).

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reciprocal duties for their beneficiaries. It is, therefore, reckoned to be scandalous that there should be less than a 100% uptake by those thus entitled to benefit. It is a scandal which activists both inside and outside that machinery constantly labour to diminish.[51]

The effects of the operation of Murray's Law are bound to increase the larger the amounts paid out in welfare payments to each beneficiary. In any expanding economy in which the decision makers are misguided by ideals of equality and social justice those amounts themselves are bound to increase. For those ideals require relativistic standards of poverty according to which the size of the various welfare payments to be provided is determined: not by reference to some comparatively fixed and stable standard of hardship, but by reference to, and relative to, the rising average level of incomes over the population as a whole.[52]

There is by now a great and ever growing accumulation of evidence to show the strength of the effects brought about by the operation of Murray's Law of Unintended Rewards. But one recent study is peculiarly impressive for anyone who can remember how miserably low the living standards of the households of unemployed working men were in the UK during the nineteen thirties. The conclusions of this study were unequivocal and decisive:

> In summary, the cross-sectional evidence...reveals a pattern that is inescapable: the inter-war unemployment insurance system importantly shaped the unemployment histories of every nook and cranny of Britain. Whether one examines

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[51] D. Anderson, ed., *The Loss of Virtue: Moral Confusion and Social Disorder in Britain and America* (New York: Social Affairs Unit and National Review, 1992)., p. 209. Enormous funds are spent by the British welfare services in promoting public knowledge of individual's rights to welfare benefits. In theory this is supposed to help the needy who may be ignorant of the assistance available to them, but in practice it creates a climate of opinion in which the individual is encouraged to seek out what he can get and to behave in a way which will justify receiving benefits.

[52] Or even by reference to, and relative to, the levels achieved by the best off. See D. Green, *Equalizing People* (London: Institute of Economic Affairs, 1990), Chapter II, for several examples of the ways in which persons paid as social scientists contrive to work themselves and to invite others into frenzies of indignation by misrepresenting lesser improvements in the condition of the worst off than in the condition of the best off as a "grotesque increase" in the burden of poverty under administrations -- those, of course, of Margaret Thatcher -- which in this way allegedly continued to "*reduce* the incomes of the poorest" (emphasis original).

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> the pattern by age, sex, industry, duration, location or skill, one simple fact emerges: lowering the cost of an activity [an inactivity-AF] induces more of that activity [or inactivity-AF]. In the present instance, lowering the cost of unemployment induced more unemployment in inter-war Britain.[53]

It may nevertheless be allowed that "There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody needs to descend".[54] A prudent government, however, even when that assured minimum income was very low would still, at least in the case of conditions which could have been avoided, try to find ways of channeling the necessary relief funds through private organizations less inhibited from discriminating between deserving and undeserving recipients than our present welfare state bureaucracies.

It is remarkable that Milton Friedman in developing his proposals for a Negative Income Tax appears never to have considered the relevance to its introduction of the economists' general Law of Supply and Demand, of which what Murray was later to formulate as his Law of Unintended Rewards can be seen as a special case. For, as we may learn from Murray, it was in an attempt to meet the objection that the introduction of such a guaranteed income would cause people to reduce their work effort or to drop out of the labour force altogether that the Office of Economic Opportunity set up "the most ambitious social-science experiment in history".[55] The result was totally decisive, demonstrating beyond all possibility of dispute that the objections had been and were right.

We can perhaps avoid attributing any such oversight to Hayek. For, later in the book in which he conceded that government might take steps "to assure to all protection against severe deprivation...a floor below which no one needs to descend," he went on to insist that "The mischievous idea that all public needs should be satisfied by compulsory organization...is wholly alien to the basic principles of a free society. The true liberal must on the contrary desire as many as possible of those 'particular societies within the state',

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[53] K. Matthews and D. Benjamin, *US and UK Unemployment between the Wars: A Doleful Story* (London: Institute of Economic Affairs, 1992), p. 110.
[54] Hayek, *The Mirage of Social Justice*, p. 87.
[55] Murray, p. 149.

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voluntary organizations between the individual and government, which...Rousseau and the French Revolution wanted to suppress".[56]

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[56] Hayek, *The Mirage of Social Justice,* pp. 150 - 151.

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THE POLITICAL ECONOMY OF MONARCHY AND DEMOCRACY, AND THE IDEA OF A NATURAL ORDER

*Hans-Hermann Hoppe**

I. THEORY: THE COMPARATIVE ECONOMICS OF PRIVATE AND PUBLIC GOVERNMENT OWNERSHIP

A government is a territorial monopolist of compulsion — an agency which may engage in continual, institutionalized property rights violations and the exploitation — in the form of expropriation, taxation and regulation — of private property owners. Assuming no more than self-interest on the part of government agents, all governments must be expected to make use of this monopoly and thus exhibiting a tendency toward *increased* exploitation.[1] However, not every form of government can be expected to be equally successful in this endeavor or to go about it in the same way. Rather, in light of elementary economic theory, the conduct of government and the effects of government policy on civil society can

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[1] On the theory of the state see M.N. Rothbard, *For A New Liberty* (New York: Macmillan, 1978); idem, *The Ethics of Liberty* (Atlantic Highlands: Humanities Press, 1982); idem, *Power and Market* (Kansas City: Sheed, Andrews & McMeel, 1977); H.H. Hoppe, *Eigentum, Anarchie und Staat* (Opladen: Westdeutscher Verlag, 1987); idem, *A Theory of Socialism and Capitalism* (Boston: Kluwer, 1989); idem, *The Economics and Ethics of Private Property* (Boston: Kluwer, 1993); also A.J. Nock, *Our Enemy, the State* (Delevan: Hallberg Publishing Co., 1983); F. Oppenheimer, *The State* (New York: Vanguard Press, 1914); idem, *System der Soziologie. Vol.2: Der Staat* (Stuttgart: G. Fischer, 1964).

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be expected to be systematically different, depending on whether the government apparatus is owned privately or publicly.[2]

The defining characteristic of private government ownership is that the expropriated resources and the monopoly privilege of future expropriation are individually *owned*. The appropriated resources are added to the ruler's private estate and treated as if they were a part of it, and the monopoly privilege of future expropriation is attached as a title to this estate and leads to an instant increase in its present value ('capitalization' of monopoly profit). Most importantly, as private owner of the government estate, the ruler is entitled to pass his possessions onto his personal heir; he may sell, rent, or give away part or all of his privileged estate and privately pocket the receipts from the sale or rental; and he may personally employ or dismiss every administrator and employee of his estate.

In contrast, with a publicly owned government the control over the government apparatus lies in the hands of a trustee, or caretaker. The caretaker may use the apparatus to his personal advantage, but he does not own it. He cannot sell government resources and privately pocket the receipts, nor can he pass government possessions onto his personal heir. He owns the *current use* of government resources, but not their capital value. Moreover, while entrance into the position of a private owner of government is restricted by the owner's personal discretion, entrance into the position of a caretaker-ruler is open. Anyone, in principle, can become the government's caretaker.

From these assumptions two central, interrelated predictions can be deduced: (1) A private government owner will tend to have a systematically longer planning horizon, i.e., his degree of time preference will be lower, and accordingly, his degree of economic exploitation will tend to be less than that of a government caretaker; and (2), subject to a higher degree of exploitation, the non-governmental public will also be comparatively more present-oriented under a system of publicly-owned government than under a regime of private government ownership.

(1) A private government owner will predictably try to maximize his total wealth; i.e., the present value of his estate *and* his current income. He will *not* want to increase his current income at the

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[2] See on the following also H.H. Hoppe, "Time Preference, Government, and the Process of De-Civilization — From Monarchy to Democracy", *Journal des Economistes et des Etudes Humaines*, Vol.V, No.4, 1994.

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expense of a more than proportional drop in the present value of his assets, and because acts of current income acquisition invariably have repercussions on present asset values (reflecting the value of all future — expected — asset earnings discounted by the rate of time preference), private ownership in and of itself leads to economic calculation and thus promotes farsightedness. In the case of the private ownership of *government,* this implies a distinct moderation with respect to the ruler's incentive to exploit his monopoly privilege of expropriation, for acts of expropriation are by their nature parasitic upon prior acts of production on the part of the non-governmental public. Where nothing has first been produced, nothing can be expropriated; and where everything is expropriated, all future production will come to a shrieking halt. Accordingly, a private government owner will want to avoid exploiting his subjects so heavily, for instance, as to reduce his future earnings potential to such an extent that the present value of his estate actually falls. Instead, in order to preserve or possibly even enhance the value of his personal property, he will systematically restrain himself in his exploitation policies. For the lower the degree of exploitation, the more productive the subject population will be; and the more productive the population, the higher will be the value of the ruler's parasitic monopoly of expropriation. He will use his monopolistic privilege, of course. He will not exploit. But as the government's private owner, it is in his interest to draw parasitically on a growing, increasingly productive and prosperous non-government economy as this would effortlessly also increase his own wealth and prosperity — and the degree of exploitation thus would tend to be low.

Moreover, private ownership of government implies moderation and farsightedness for yet another reason. All private property is by definition exclusive property. He who owns property is entitled to exclude everyone else from its use and enjoyment; and he is at liberty to choose with whom, if anyone, he is willing to share in its usage. Typically, he will include his family and exclude all others, except as invited guests or as paid employees or contractors. Only the ruling family — and to a minor extent its friends, employees and business partners — share in the enjoyment of the expropriated resources and can thus lead a parasitic life. Because of these restrictions regarding entrance into government and the exclusive status of the individual ruler and his family, private government ownership stimulates the development of a clear "class consciousness" on the part of the non-governmental public and

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promotes the opposition and resistance to any expansion of the government's exploitative power. A clear-cut distinction between the — few — rulers on the one hand and the — many — ruled on the other exists, and there is little risk or hope of anyone of either class ever falling or rising from one class to the other. Confronted with an almost insurmountable barrier in the way of upward mobility, the solidarity among the ruled — their mutual identification as actual or potential victims of governmental property rights violations — is strengthened, and the risk to the ruling class of losing its legitimacy as the result of increased exploitation is heightened.[3]

In distinct contrast, the caretaker of a publicly owned government will try to maximize not total government wealth (capital values and current income), but current income (regardless, and at the expense, of capital values). Indeed, even if the caretaker wishes to act differently, he *cannot*. Because as public property government resources are not for sale, and without market prices economic calculation is *impossible*. Accordingly, it has to be regarded as unavoidable that public government ownership will result in continual capital consumption. Instead of maintaining or even enhancing the value of the government estate, as a private owner would tend to do, a government's temporary caretaker will quickly use up as much of the government resources as possible, for what he does not consume *now*, he may *never* be able to consume. In particular, a caretaker — as distinct from a government's private owner — has no interest in not ruining his country. For why should he *not* want to increase his exploitation, if the advantage of a policy of moderation —the resulting higher capital value of the government estate —can*not* be reaped privately, while the advantage of the opposite policy of increased exploitation — a higher current income — *can* be so reaped? To a caretaker, unlike to a private owner, moderation has only disadvantages and no advantages.[4]

In addition, with a publicly owned government anyone in principle can become a member of the ruling class or even the supreme power. The distinction between the rulers and the ruled as well as the class consciousness of the ruled become blurred. The illusion even arises that the distinction no longer exists: that with a

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[3] See also B. de Jouvenel, *On Power* (New York: Viking, 1949), esp. pp.9-10.

[4] See M.N. Rothbard, *Power and Market*, pp.188-189; also G. Hardin & J. Baden, eds., *Managing the Commons* (San Francisco: W.H. Freeman, 1977; and M. Olson, "Dictatorship, Democracy, and Development", *American Political Science Review* 87, 3, 1993.

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public government no one is ruled by anyone, but everyone instead rules himself. Accordingly, public resistance against government power is systematically weakened. While exploitation and expropriation before might have appeared plainly oppressive and evil to the public, they seem much less so, mankind being what it is, once anyone may freely enter the ranks of those who are at the receiving end. Consequently, not only will exploitation increase, whether openly in the form of higher taxes or discretely as increased governmental money 'creation' (inflation) or legislative regulation. Likewise, the number of government employees ('public servants') will rise absolutely as well as relatively to private employment, in particular attracting and promoting individuals with high degrees of time preference, and low and limited farsightedness.

(2) In contrast to the right to self-defense in the event of a criminal attack, the victim of government violations of private property rights may not legitimately defend himself against such violations.[5]

The imposition of a government tax on property or income violates a property owner's and income producer's rights as much as theft does. In both cases the owner-producer's supply of goods is diminished against his will and without his consent. Government money or 'liquidity' creation involves no less a fraudulent expropriation of private property owners than the operations of a criminal counterfeiting gang. As well, any government regulation as to what an owner may or may not do with his property — beyond the rule that no one may physically damage the property of others and that all exchange and trade be voluntary and contractual — implies a "taking" of somebody's property, on a par with acts of extortion, robbery, or destruction. But taxation, the government's provision for liquidity, and government regulations, unlike their criminal equivalents, are considered legitimate, and the victim of government interference, unlike the victim of a crime, is *not* entitled to physically defend and protect his property.

Owing to their legitimacy, then, government violations of property rights affect individual time preferences in a systematically different and much more profound way than crime. Like crime, all government interference with private property rights reduces someone's supply of present goods and thus raises his effective time

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[5] In addition to the works quoted in Fn.1 above, see L.Spooner, *No Treason: The Constitution of No Authority* (Larkspur: Pine Tree Press, 1966), p.17.

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preference rate. However, government offenses — unlike crime — simultaneously raise the time preference *degree* of actual and potential victims because they also imply a reduction in the supply of *future* goods (a reduced rate of return on investment). Crime, because it is illegitimate, occurs only intermittently — the robber disappears from the scene with his loot and leaves his victim alone. Thus, crime can be dealt with by increasing one's demand for protective goods and services (relative to that for non-protection goods) so as to restore or even increase one's future rate of investment return and make it less likely that the same or a different robber will succeed a second time. In contrast, because they are legitimate, governmental property rights violations are continual. The offender does not disappear into hiding but stays around, and the victim does not 'arm' himself but must (at least he is generally expected to) remain defenseless. The actual and potential victims of government property rights violations — as demonstrated by their continued defenselessness vis-a-vis their offenders —respond by associating a permanently higher risk with all future production and systematically adjusting their expectations concerning the rate of return on all future investment downward. By simultaneously reducing the supply of present *and* expected future goods, then, governmental property rights violations not only raise time preference *rates* (with given schedules) but also time preference *schedules*. Because owner-producers are — and see themselves as — defenseless against future victimization by government agents, their expected rate of return on productive, future-oriented actions is reduced all-around, and accordingly, all actual and potential victims become more present-oriented.[6]

Moreover, because the degree of exploitation is comparatively higher under a publicly owned government, this tendency toward present-orientation will be significantly more pronounced if the government is publicly owned than if it is owned privately.[7]

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[6] On the phenomenon and theory of time preference see in particular L.v. Mises, *Human Action. A Treatise on Economics* (Chicago: H. Regnery, 1966), chs. XVIII, XIX; also W.St. Jevons, *Theory of Political Economy* (New York: A. Kelley, 1965); E.v. Böhm-Bawerk, *Capital and Interest*, 3 vols. (South Holland: Libertarian Press, 1959); F. Fetter, *Capital, Interest, and Rent* (Kansas City: Sheed, Andrews & McMeel, 1977); M.N. Rothbard, *Man, Economy, and State* (Los Angeles: Nash, 1970).

[7] See also H.H. Hoppe, "Time Preference, Government, and the Process of De-Civilization — From Monarchy to Democracy".

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II. APPLICATION: THE TRANSITION FROM MONARCHY TO DEMOCRACY (1789-1918)

Hereditary monarchies represent the historical example of privately owned governments, and democratic republics that of publicly owned governments.

For most of its history, mankind, insofar as it was subject to any government control at all, was under monarchical rule. There were exceptions: Athenian democracy, Rome during its republican era until 31 B.C., the republics of Venice, Florence and Genoa during the renaissance period, the Swiss cantons since 1291, the United Provinces from 1648 until 1673, and England under Cromwell from 1649 until 1660. Yet these were rare occurrences in a world dominated by monarchies. With the exception of Switzerland, they were short-lived phenomena. Constrained by monarchical surroundings, all older republics satisfied the open-entry condition of public property only imperfectly, for while a republican form of government implies by definition that the government is not privately but publicly owned, and a republic can thus be expected to possess an inherent tendency toward the adoption of universal suffrage, in all of the earlier republics, entry into government was limited to relatively small groups of 'nobles'.

With the end of World War I, mankind truly left the monarchical age.[8] In the course of one and a half centuries since the French Revolution, Europe, and in its wake the entire world, have undergone a fundamental transformation. Everywhere, monarchical rule and sovereign kings were replaced by democratic-republican rule and sovereign 'peoples'.

The first assault of republicanism and the idea of popular sovereignty on the dominating monarchical principle was repelled with the military defeat of Napoleon and the restoration of Bourbon rule in France; as a result of the revolutionary terror and the Napoleonic wars, republicanism was widely discredited for much of the 19th century. However, the democratic-republican spirit of the French revolution left a permanent imprint. From the restoration of

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[8] See on this G. Ferrero, *Peace and War* (Freeport: Books for Libraries Press, 1969), esp. ch.3; idem, *Macht* (Bern: A. Francke, 1944); E.v. Kuehnelt-Leddihn, *Leftism Revisited* (Washington D.C.: H. Regnery, 1990); R. Bendix, *Kings or People* (Berkeley: University of California Press, 1978).

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the monarchical order in 1815 until the outbreak of WW I in 1914, all across Europe popular political participation and representation was systematically expanded. The franchise was successively widened and the powers of popularly elected parliaments increased everywhere.[9]

From 1815 to 1830, the right to vote in France was still severely restricted under the restored Bourbons. Out of a population of some 30 million, the electorate included only France's very largest property owners — about 100,000 people (or less than one half of one percent of the population above the age of 20). As a result of the July Revolution of 1830, the abdication of Charles X and the ascension to the throne of the Duke of Orleans, Louis Philippe, the number of voters increased to about 200,000. As a result of the revolutionary upheavals of 1848, France again turned republican, and a universal and unrestricted suffrage for all male citizens above the age of 21 was introduced. Napoleon III was elected by nearly 5.5 million votes out of an electorate of more than 8 million.

In the United Kingdom, after 1815 the electorate consisted of some 500,000 well-to-do property owners (about 4 percent of the population above age 20). The Reform Bill of 1832 lowered the property owner requirements and extended the franchise to about 800,000. The next extension, from about 1 million to 2 million, came with the Second Reform Bill of 1867. In 1884 property restrictions were relaxed even further, and the electorate increased to about 6 million (almost a third of the population above age 20 and more than three-fourths of all male adults).

In Prussia, as the most important of the 39 independent German states recognized after the Vienna Congress, democratization set in with the revolution of 1848 and the constitution of 1850. The lower chamber of the Prussian parliament was hence elected by universal male suffrage. However, until 1918 the electorate remained stratified into three estates with different voting powers. For example, the wealthiest people — those who contributed a third of all taxes — elected a third of the members of the lower house. In 1867 the North German Confederation including Prussia and 21 other German states was founded. Its constitution provided for universal unrestricted suffrage for all males above the age of 25. In 1871,

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[9] For a detailed documentation see P. Flora, *State, Economy, and Society in Western Europe 1815-1975*, Vol.I (Frankfurt/M.: Campus, 1983), ch.3; also R.R. Palmer & J. Colton, *A History of the Modern World* (New York: A. Knopf, 1992), esp. chs. XIV, XVIII.

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after the victory over Napoleon III, the constitution of the North German Confederation was essentially assumed by the newly founded German Empire. Out of a total population of around 35 million, nearly 8 million people (or about a third of the population above 20) elected the first German Reichstag.

After Italy's political unification under the leadership of the Kingdom of Sardinia and Piedmont in 1861, initially the vote was only given to about 500,000 people out of a population of some 25 million (about 3.5 percent of the population above age 20). In 1882, the property requirements were relaxed, and the minimum age was lowered from 25 to 21 years. As a result, the Italian electorate increased to more than 2 million. In 1913, an almost universal and unrestricted suffrage for all males above 30 and minimally restricted suffrage for males above 21 was introduced, raising the number of Italian voters to more than 8 million (more than 40 percent of the population above 20).

In Austria, restricted and unequal male suffrage was introduced in 1873. The electorate, composed of four classes or *curia* of unequal voting powers, totaled 1.2 million voters out of a population of about 20 million (10 percent of the population above 20). In 1867 a fifth *curia* was added. And forty years later the *curia* system was abolished, and universal and equal suffrage for males above age 24 was adopted, bringing the number of voters close to 6 million (almost 40 percent of the population above 20).

Russia had elected provincial and district councils — *zemstvos* — since 1864; and in 1905, as a fallout of its lost war against Japan, it created a parliament — the *Duma* — which was elected by a near universal, although indirect and unequal, male suffrage. As for Europe's minor powers, universal or almost universal and equal male suffrage has existed in Switzerland since 1848, and was adopted between 1890 and 1910 in Belgium, the Netherlands, Norway, Sweden, Spain, Greece, Bulgaria, Serbia, and Turkey.

Although increasingly emasculated, the monarchical principle remained dominant until the cataclysmic events of WW I. Before 1914, only two republics existed in Europe — France and Switzerland. And of all major European monarchies, only the United Kingdom could be classified as a parliamentary system; that is, one where the supreme power was vested in an elected parliament. Only four years later, after the United States — where the democratic principle implied in the idea of a republic had only recently been carried to victory as a result of the destruction of the

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secessionist Confederacy by the centralist Union government[10] — had entered the European war and decisively determined its outcome, monarchies had all but disappeared, and Europe turned to democratic republicanism.[11]

In Europe, the defeated Romanovs, Hohenzollerns, and Habsburgs had to abdicate or resign, and Russia, Germany, and Austria became democratic republics with universal — male and female —suffrage and parliamentary governments. Likewise, all of the newly created successor states — Poland, Finland, Estonia, Latvia, Lithuania, Hungary, and Czechoslovakia (with the sole exception of Yugoslavia) — adopted democratic republican constitutions. In Turkey and Greece, the monarchies were overthrown. Even where monarchies remained nominally in existence, as in Great Britain, Italy, Spain, Belgium, the Netherlands, and the Scandinavian countries, monarchs no longer exercised any governing power. Universal adult suffrage was introduced, and all government power was invested in parliaments and 'public' officials.[12] A new world order — the democratic republican age under the aegis of a dominating U.S. government — had begun.

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[10] On the aristocratic (un-democratic) character of the early U.S., see Lord Acton, "Political Causes of the American Revolution" in: idem, *The Liberal Interpretation of History* (Chicago: University of Chicago Press, 1967); also, Ch. Woltermann, "Federalism, Democracy and the People", *Telos*, Vol.26,1, 1993.

[11] On the U.S. war involvement see J.F.C. Fuller, *The Conduct of War* (New York: Da Capo, 1992), ch.IX; on the role of Woodrow Wilson, and his policy of wanting to 'make the world safe for democracy', see M.N. Rothbard, "World War I as Fulfillment; Power and the Intellectuals", *Journal of Libertarian Studies*, 9, no.1, 1989; P. Gottfried, "Wilsonianism: The Legacy that Won't Die", *Journal of Libertarian Studies*, 9, no.2, 1990; E.v. Kuehnelt-Leddihn, *Leftism Revisited*, ch.15.

[12] Interestingly, the Swiss Republic, which had been the first country to establish universal male suffrage (in 1848), was the last to expand the suffrage also to women (in 1971). Similarly, the French Republic, where universal male suffrage had existed since 1848, extended the franchise to women only in 1945.

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III. EVIDENCE AND ILLUSTRATIONS: EXPLOITATION AND PRESENT-ORIENTEDNESS UNDER MONARCHY AND DEMOCRATIC REPUBLICANISM

From the viewpoint of economic theory, the end of WW I can be identified as the point in time at which private government ownership was completely replaced by public government ownership, and whence a systematic tendency toward increased exploitation — government growth — and rising degrees of social time preference — present-orientedness — can be expected to take off. Indeed, such has been the grand, underlying theme of post-WWI Western history: With some forebodings in the last third of the 19th century in conjunction with an increased emasculation of the 'ancien regimes', from 1918 onward practically all indicators (1) of governmental exploitation and (2) of rising time preferences have exhibited a systematic upward tendency.

III.1. Indicators of Exploitation

There is no doubt that the amount of *taxes* imposed on civil society increased during the monarchical age.[13] However, throughout the entire period, the *share* of government revenue remained remarkably stable and low. Economic historian Carlo M. Cipolla concludes, "All in all, one must admit that the portion of income drawn by the public sector most certainly increased from the eleventh century onward all over Europe, but it is difficult to imagine that, apart from particular times and places, the public power ever managed to draw more than 5 to 8 percent of national income." And he then goes on to note that this portion was not systematically exceeded until the second half of the 19th century.[14] Until then, of all Western European countries only the United Kingdom, for instance, had an income tax (from 1843 on). France first introduced some form of income tax in 1873, Italy in 1877, Norway in 1892, the Netherlands in 1894, Austria in 1898, Sweden in 1903, the U.S. in 1913, Switzerland in 1916, Denmark and Finland in 1917, Ireland and Belgium in 1922, and Germany in

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[13] See H.J. Schoeps, *Preussen. Geschichte eines Staates* (Frankfurt/M.: Ullstein, 1981), p.405 on data for England, Prussia, and Austria.

[14] C.M. Cipolla, *Before the Industrial Revolution. European Society and Economy, 1000-1700* (New York: W.W. Norton, 1980), p.48.

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1924.[15] Yet even at the time of the outbreak of WW I, total government expenditure as a percentage of Gross Domestic Product (GDP) typically had not risen above 10 percent and only rarely, as in the case of Germany, exceeded 15 percent. In striking contrast, with the onset of the democratic republican age, total government expenditure as a percentage of GDP typically increased to 20 to 30 percent in the course of the 1920s and 1930s, and by the mid-1970s had generally reached 50 percent.[16]

There is also no doubt that total *government employment* increased during the monarchical age. But until the very end of the 19th century, government employment rarely exceeded 3 percent of the total labor force. In contrast, by the mid-1970s government employment as a percentage of the total labor force had typically grown to above 15 percent.[17]

The same pattern emerges from an inspection of *inflation* and data on the *money supply*. The monarchical world was generally characterized by the existence of a *commodity* money — typically silver or gold. A commodity money standard makes it difficult, if not impossible, for a government to inflate the money supply. There had been attempts to introduce an irredeemable fiat currency. But these fiat money experiments, associated in particular with the Bank of Amsterdam, the Bank of England, and John Law and the Banque Royale of France, had been regional curiosities which ended quickly in financial disasters, such as the collapse of the Dutch "Tulip Mania" in 1637 and the "Mississippi Bubble" and the "South Sea Bubble" in 1720. As hard as they tried, monarchical rulers did not succeed in establishing monopolies of pure fiat currencies, i.e., of irredeemable government paper monies, which can be created virtually out of thin air, at practically no cost.

It was only under conditions of all-around democratic republicanism, after 1918, that this feat was accomplished. During WW I, as during earlier wars, belligerent governments went off the gold standard. Unlike earlier wars, however, WW I did not

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[15] See P. Flora, *State, Economy and Society in Western Europe*, Vol.1, pp. 258-259.

[16] *Ibid*, ch.8.

[17] *Ibid*, ch.5.

In fact, the share of government employment in present times must be considered systematically *under*estimated, for apart from excluding all military personnel it also excludes the personnel in hospitals, welfare institutions, social insurance agencies, and nationalized industries.

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conclude with a return to the gold standard. Instead, from the mid-1920s until 1971, and interrupted by a series of international monetary crises, a pseudo gold standard — the gold exchange standard — was implemented. In 1971, the last remnant of the international gold standard was abolished. Since then, and for the first time in history, the entire world has adopted a pure fiat money system of freely fluctuating government paper currencies.[18]

As a result, a seemingly permanent secular tendency toward inflation and currency depreciation has come into existence.

During the monarchical age, with a commodity money largely outside of government control the 'level' of prices had generally fallen and the purchasing power of money increased, except during times of war or new gold discoveries. Various price indices for Britain, for instance, indicate that prices were substantially lower in 1760 than they had been hundred years earlier; and in 1860 they were lower than they had been in 1760.[19] Connected by an international gold standard, the development in other countries was similar.[20] In sharp contrast, during the democratic republican age, with the world financial center shifted from Britain to the U.S., a very different pattern emerged. For instance, shortly after WW I, in 1921, the U.S. wholesale commodity price index stood at 113.[21] After WW II, in 1948, it had risen to 185. In 1971 it was 255, by 1981 it reached 658, and in 1991 it was near 1,000. During only two decades of irredeemable fiat money, the consumer price index in the U.S. rose from 40 in 1971 to 136 in 1991, in the United Kingdom it climbed from 24 to 157, in France from 30 to 137, and in Germany from 56 to 116.[22]

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[18] See also M.N. Rothbard, *What Has Government Done to Our Money?* (Auburn, Al.: Ludwig von Mises Institute, 1990); H.H. Hoppe, "How is Fiat Money Possible? or, The Devolution of Money and Credit", *Review of Austrian Economics*, Vol.7, no.2, 1994.

[19] See B.R. Mitchell, *Abstract of British Historical Statistics* (Cambridge: Cambridge University Press, 1962), pp.468ff.

[20] Idem, *European Historical Statistics 1750-1970* (New York: Columbia University Press, 1078), pp.388ff.

[21] 1930 = 100; see R.Paul and L.Lehrmann, *The Case for Gold. A Minority Report to the U.S. Gold Commission* (Washington D.C.: Cato Institute, 1982), p.165f.

[22] 1983 = 100; see *Economic Report of the President* (Washington D.C.: Government Printing Office, 1992).

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Similarly, during more than 70 years, from 1845 until the end of WW I in 1918, the British money supply had increased about six-fold.[23] In distinct contrast, during the 73 years from 1918 until 1991, the U.S. money supply increased more than sixty-four-fold.[24]

In addition to taxation and inflation, a government can resort to *debt* in order to finance its current expenditures. As with taxation and inflation, there is no doubt that government debt increased in the course of the monarchical age. However, as predicted theoretically, in this field monarchs also showed considerably more moderation and farsightedness than democratic republican caretakers.

Throughout the monarchical age, government debts were essentially war debts. While the total debt thereby tended to increase over time, during peace time at least monarchs characteristically *reduced* their debts. The British example is fairly representative. In the course of the 18th and 19th centuries, government debt increased. It was 76 million pounds after the Spanish War in 1748, 127 million after the Seven Years' War in 1763, 232 million after the American War of Independence in 1783, and 900 million after the Napoleonic Wars in 1815. Yet during each peacetime period — from 1727-1739, from 1748-1756, and from 1762-1775, total debt actually decreased. From 1815 until 1914, the British national debt fell from a total of 900 to below 700 million pounds.

In striking contrast, since the onset of the democratic republican age British debt only increased, in war *and* in peace. In 1920 it was 7.9 billion pounds, in 1938 8.3 billion, in 1945 22.4 billion, in 1970 34 billion, and since then it has skyrocketed to more than 190 billion pounds in 1987.[25] Likewise, U.S government debt has increased through war and peace. Federal government debt after WW I, in 1919, was about 25 billion dollars. In 1940 it was 43 billion, and after WW II, in 1946, it stood at about 270 billion. By 1970 it had risen to 370 billion, and since 1971, under a pure fiat money regime, it has literally exploded. In 1979 it was about 840

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[23] See Mitchell, *Abstract of British Historical Statistics*, p.444f.

[24] See M. Friedman & A. Schwartz, *A Monetary History of the United States, 1867-1960* (Princeton: Princeton University Press, 1963), pp.704-722; and *Economic Report of the President*, 1992.

[25] See S. Homer & R. Sylla, *A History of Interest Rates* (New Brunswick: Rutgers University Press, 1991), pp.188/437.

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billion, and in 1985 more than 1.8 trillion. In 1988 it reached almost 2.5 trillion, and by 1992 it exceeded 3 trillion dollars.[26]

Finally, the same tendency toward increased exploitation and present-orientation emerges upon examination of government *legislation and regulation*. During the monarchical age, with a clear-cut distinction between the ruler and the ruled, the king and his parliament were held to be *under* the law. They applied pre-existing law as judge or jury. They did not make law. Writes Bertrand de Jouvenel: "The monarch was looked on only as judge and not as legislator. He made subjective rights respected and respected them himself; he found these rights in being and did not dispute that they were anterior to his authority. ... Subjective rights were not held on the precarious tenure of grant but were freehold possessions. The sovereign's right also was a freehold. It was a subjective right as much as the other rights, though of a more elevated dignity, but it could not take the other rights away."[27] To be sure, the monopolization of law administration led to higher prices and/or lower product quality than those that would have prevailed under competitive conditions, and in the course of time kings employed their monopoly increasingly to their own advantage. But as late as the beginning of the 20th century, A.V. Dicey could still maintain that as for Great Britain, for instance, legislative law — public law — as distinct from pre-existing law — private law — did not exist.[28]

In striking contrast, under democracy, with the exercise of power shrouded in anonymity, presidents and parliaments quickly came to rise *above* the law. They became not only judge but legislator, the creator of "new" law.[29] Today, notes Jouvenel, "we are used to having our rights modified by the sovereign decisions of legislators. A landlord no longer feels surprised at being compelled

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[26] See J. Hughes, *American Economic History* (Glenview: Scott, Foresman, 1990), pp.432, 498, 589.

[27] B. de Jouvenel, *Sovereignty*, pp.172-173; p.189; see also F. Kern, *Kingship and Law in the Middle Ages* (London, 1939), esp. p.151; B. Rehfeld, *Die Wurzeln des Rechts* (Berlin, 1951), esp. p.67.

[28] See A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1903); also F.A. Hayek, *Law, Legislation, and Liberty*, Vol. 1 (Chicago: University of Chicago Press, 1973), chs. 4 and 6.

[29] See R. Nisbet, *Community and Power* (New York: Oxford University Press, 1962), pp.110-111.

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to keep a tenant; an employer is no less used to having to raise the wages of his employees in virtue of the decrees of Power. Nowadays it is understood that our subjective rights are precarious and at the good pleasure of authority."[30] In a development similar to the democratization of money — the substitution of government paper money for private commodity money and the resulting inflation and increased financial uncertainty — the democratization of law and law administration has led to a steadily growing flood of legislation. Presently, the number of legislative acts and regulations passed by parliaments in the course of a single year is in the tens of thousands, filling hundreds of thousands of pages, affecting all aspects of civil and commercial life, and resulting in a steady depreciation of all law and heightened legal uncertainty. As a typical example, the 1994 edition of the *Code of Federal Regulations* (CFR), the annual compendium of all U.S. Federal Government regulations currently in effect, consists of a total of 201 books, occupying about 26 feet of library shelf space. The Code's index alone is 754 pages. The Code contains regulations concerning the production and distribution of almost everything imaginable: from celery, mushrooms, watermelons, watchbands, the labeling of incandescent light bulbs, hosiery, parachute jumping, iron and steel manufacturing, sexual offenses on college campuses to the cooking of onion rings made out of diced onions, revealing the almost totalitarian power of a democratic government.[31]

III.2. Indicators of Present-Orientedness

The phenomenon of social time preference is somewhat more elusive than that of expropriation and exploitation, and it is more complicated to identify suitable indicators of present-orientation. Moreover, some indicators are less direct — 'softer' — than those of exploitation. But all of them point in the same direction and together provide as clear an illustration of the second theoretical prediction: that democratic rule also promotes short-sightedness (present-orientation) within civil society.[32]

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[30] B. de Jouvenel, *Sovereignty*, p.189; see also R. Nisbet, *Community and Power*, ch.5.

[31] See D. Boudreaux, "The World's Biggest Government", *Free Market*, November 1994.

[32] See also T.A. Smith, *Time and Public Policy* (Knoxville: University of Tennessee Press, 1988).

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The most direct indicator of social time preference is the rate of *interest*. The interest rate is the ratio of the valuation of present goods as compared to future goods. More specifically, it indicates the premium at which present money is traded against future money. A high interest rate implies more "present-orientedness" and a low rate of interest implies more "future-orientation." Under normal conditions — that is under the assumption of increasing standards of living and real money incomes — the interest rate can be expected to fall and ultimately approach, yet never quite reach, zero, for with rising real incomes, the marginal utility of present money falls relative to that of future money, and hence under the ceteris paribus assumption of a *given* time preference *schedule* the interest *rate* must fall. Consequently, savings and investment will increase, future real incomes will be still higher, and so on.

In fact, a tendency toward falling interest rates characterizes mankind's suprasecular trend of development. Minimum interest rates on 'normal safe loans' were around 16 percent at the beginning of Greek financial history in the sixth century B.C., and fell to 6 percent during the Hellenistic period. In Rome, minimum interest rates fell from more than 8 percent during the earliest period of the Republic to 4 percent during the first century of the Empire. In 13th century Europe, the lowest interest rates on 'safe' loans were 8 percent. In the 14th century they came down to about 5 percent. In the 15th century they fell to 4 percent. In the 17th century they went down to 3 percent. And at the end of the 19th century minimum interest rates had further declined to less than 2.5 percent.[33]

This trend was by no means smooth. It was frequently interrupted by periods, sometimes as long as centuries, of rising interest rates. However, such periods were associated with major wars and revolutions such as the Hundred Years' War during the 14th century, the Wars of Religion from the late 16th to the early 17th century, the American and French Revolutions and the Napoleonic Wars from the late 18th to the early 19th century, and the two World Wars in the 20th century. Furthermore, whereas high or rising minimum interest rates indicate periods of generally low or declining living standards, the overriding opposite tendency toward low and falling interest rates reflects mankind's over-all progress — its advance from barbarism to civilization. Specifically, the trend toward lower interest rates reflects the rise of the Western World, its

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[33] See Homer/Sylla, *A History of Interest Rates*, pp.557-558.

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peoples' increasing prosperity, farsightedness, intelligence, and moral strength, and the unparalleled height of 19th-century European civilization.

Before this historical backdrop and in accordance with economic theory, then, it should be expected that 20th century interest rates would have to be still *lower* than 19th century rates. Indeed, only two possible explanations exist why this is *not* so. The first possibility is that 20th century real incomes did not exceed, or even fell below, 19th century incomes. However, this explanation can be ruled out on empirical grounds, for it seems fairly uncontroversial that 20th century incomes are in fact higher. Then only the second explanation remains, however. If real incomes are higher but interest rates are not lower, then the ceteris paribus clause can no longer be assumed true. Rather, the social time preference *schedule* must have shifted upward. That is, the character of the population must have changed. People on the average must have lost in moral and intellectual strength and have become more present-oriented. Indeed, this appears to be the case.

From 1815 onward, throughout Europe and the Western World minimum interest rates steadily declined to an historic low of, on the average, well below 3 percent at the turn of the century. With the onset of the democratic-republican age this earlier tendency came to a halt and seems to have changed direction, revealing 20th century Europe and the U.S. as declining civilizations. An inspection of the lowest decennial average interest rates for Britain, France, the Netherlands, Belgium, Germany, Sweden, Switzerland, and the U.S., for instance, shows that during the entire post-WW I era interest rates in Europe were never as low or lower than they had been during the second half of the 19th century. Only in the U.S., in the 1950's, did interest rates ever fall below late 19th-century rates. This was only a short-lived phenomenon, and U.S. interest rates even then were not lower than they had been in Britain during the second half of the 19th century. Instead, 20th-century rates were universally *higher* than 19th century rates, and if anything they have exhibited a *rising* tendency.[34] This conclusion does not substantially change, even when it is taken into account that modern interest rates, in particular since the 1970's, include a systematic inflation premium. After adjusting recent nominal interest rates for inflation in order to yield an estimate of *real* interest rates, contemporary interest

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[34] See Homer/Sylla, *A History of Interest Rates*, pp.554-555.

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rates still appear to be significantly higher than they were 100 years ago. On the average, minimum long-term interest rates in Europe and the U.S. nowadays seem to be well above 4 percent and possibly as high as 5 percent — that is above the interest rates of 17th century Europe and as high or higher than 15th century rates. Likewise, current U.S. savings rates of around 5 percent of disposable income are no higher than they were more than 300 years ago in a much poorer 17th century England.[35]

Parallel to this development and reflecting a more specific aspect of the same underlying phenomenon of high or rising social time preferences, indicators of *family disintegration* — 'dysfunctional families' — have exhibited a systematic increase.

Until the end of the 19th century, the bulk of government spending — typically more than 50 percent — went to financing the military. Assuming government expenditures to be then about 5 percent of the national product, this amounted to military expenditures of 2.5 percent of the national product. The remainder went to government administration. Welfare spending or "public charity" played almost no role. Insurance was considered to be in the province of individual responsibility, and poverty relief seen as the task of voluntary charity. In contrast, as a reflection of the egalitarianism inherent in democracy, from the beginning of the democratization in the late 19th century onward came the collectivization of individual responsibility. Military expenditures have typically risen to 5-10 percent of the national product in the course of the 20th century. But with public expenditures currently making up 50 percent of the national product, military expenditures now only represent 10-20 percent of total government spending. The bulk of public spending — typically more than 50 percent of total expenditures (or 25 percent of the national product) — is now eaten up by public welfare spending: by compulsory government 'insurance' against illness, occupational injuries, old age, unemployment, and an ever expanding list of other disabilities.[36]

Consequently, by increasingly relieving individuals of the responsibility of having to provide for their own health, safety, and old age, the range and temporal horizon of private provisionary action have been systematically reduced. In particular, the value of

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[35] See Cipolla, *Before the Industrial Revolution*, p.39.

[36] See Cipolla, *Before the Industrial Revolution*, pp.54-55; Flora, *State, Economy, and Society in Western Europe*, ch.8; and p.454.

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marriage, family, and children have fallen, because they are needed less as soon as one can fall back on 'public' assistance. Thus, since the onset of the democratic-republican age the number of children has declined, and the size of the endogenous population has stagnated or even fallen. For centuries, until the end of the 19th century, the birth rate had been almost constant: somewhere between 30 to 40 per 1,000 population (usually somewhat higher in predominantly Catholic and lower in Protestant countries). In sharp contrast, in the course of the 20th century all over Europe and the U.S. birthrates have experienced a dramatic decline — down to about 15 to 20 per 1,000.[37] At the same time, the rates of divorce, illegitimacy, single parenting, singledom, and abortion have steadily increased, while personal savings rates have begun to stagnate or even fall rather than rise proportionally or even over-proportionally with rising incomes.[38]

Moreover, as a consequence of the depreciation of law resulting from legislation and the collectivization of responsibility effected in particular by social security legislation, the rate of *crimes* of a serious nature, such as murder, assault, robbery, and theft, has also shown a systematic upward tendency.

In the 'normal' course of events — that is with rising standards of living — it can be expected that the protection against social disasters such as crime will undergo continual improvement, just as one would expect the protection against natural disasters such as floods, earthquakes and hurricanes to become progressively better. Indeed, throughout the Western world this appears to have been the case by and large — until recently, during second half of the 20th century, when crime rates began to climb steadily upward.[39]

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[37] See Mitchell, *European Historical Statistics 1750-1970*, pp.16ff.

[38] See A.C. Carlson, *Family Questions. Reflections on the American Social Crises* (New Brunswick: Transaction Publishers, 1992); idem, *The Swedish Experiment in Family Politics* (New Brunswick: Transaction Publishers, 1993); idem, "What Has Government Done to Our Families?", *Essays in Political Economy*, no.13 (Auburn, Al.: Ludwig von Mises Institute, 1991); Ch. Murray, *Losing Ground* (New York: Basic Books, 1984); for an early diagnosis see J.A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper, 1942), ch.14.

[39] See J.Q. Wilson & R.J. Herrnstein, *Crime and Human Nature* (New York: Simon & Schuster, 1985), pp.408-409; on the magnitude of the increase in criminal activity brought about by democratic republicanism and welfarism in the course of the last hundred years see also R.D. McGrath, *Gunfighters,*

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To be sure, there are a number of factors other than increased irresponsibility and shortsightedness brought on by legislation and welfare that may contribute to crime. Men commit more crimes than women, the young more than the old, blacks more than whites, and city dwellers more than villagers. Accordingly, changes in the composition of the sexes, age groups, races, and the degree of urbanization can be expected to have a systematic effect on crime. However, all of these factors are relatively stable and thus cannot account for any systematic change in the long-term downward trend of crime rates. As for European countries, their populations were and are comparatively homogeneous; and in the U.S., the proportion of blacks has remained roughly stable. The sex composition is largely a biological constant; and as a result of wars, only the proportion of males has periodically fallen, thus actually reinforcing the 'normal' trend toward falling crime rates. Similarly, the composition of age groups has changed only slowly; and due to declining birth rates and higher life expectancies the average age of the population has actually increased, thus helping to depress crime rates still further. Finally, the degree of urbanization began to increase dramatically from about 1800 onward. A period of rising crime rates during the early 19th century can be attributed to this initial spurt of urbanization.[40] Yet after a period of adjustment to the new phenomenon of urbanization, from the mid-19th century onward, the countervailing tendency toward falling crime rates took hold again, despite the fact that the process of rapid urbanization continued for about another hundred years. And when crime rates began to move systematically upward, from the mid-20th century onward, the process of increasing urbanization had actually come to a halt.

It thus appears that the phenomenon of rising crime rates cannot be explained other than with reference to the process of democratization: by a rising degree of social time preference, an increasing loss of individual responsibility, intellectually and morally, and a diminished respect for all law — moral relativism — stimulated by an unabated flood of legislation. Of course, 'high time preference' is by no means equivalent with 'crime'. A high time preference can also find expression in such perfectly lawful activities

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Highwaymen, and Vigilantes (Berkeley: University of California Press, 1984), esp. ch.13; idem, "Treat them to a Good Dose of Lead", *Chronicles*, January 1994.

[40] See Wilson & Herrnstein, *Crime and Human Nature*, p.411.

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as recklessness, unreliability, poor manners, laziness, stupidity or hedonism. Nonetheless, a systematic relationship between high time preference and crime exists, for in order to earn a market income a certain minimum of planning, patience and sacrifice is required. One must first work for a while before one gets paid. In contrast, most serious criminal activities such as murder, assault, rape, robbery, theft, and burglary require no such discipline. The reward for the aggressor is immediate and tangible, whereas the sacrifice — possible punishment — lies in the future and is uncertain. Consequently, if the social degree of time preference were increased, it would be expected that the frequency in particular of these forms of aggressive behavior would rise — as they in fact did.[41]

IV. CONCLUSION: MONARCHY, DEMOCRACY, AND THE IDEA OF A NATURAL ORDER

From the vantage point of elementary economic theory and in light of historical evidence, then, a revisionist view of modern history results. The Whig theory of history, according to which mankind marches continually forward toward ever higher levels of progress, is incorrect. From the viewpoint of those who prefer less exploitation over more and who value farsightedness and individual responsibility above shortsightedness and irresponsibility, the historic transition from monarchy to democracy represents not progress but civilizational decline. Nor does this verdict change if more or other indicators are included. Quite to the contrary. Without question the most important indicator of exploitation and present-orientedness *not* discussed above is *war*. Yet if this indicator were included the relative performance of democratic republican government appears to be even worse, not better. In addition to increased exploitation and social decay, the transition from monarchy to democracy has brought a change from limited warfare

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[41] On the relationship between high time preference and crime see also E.C. Banfield, *The Unheavenly City Revisited* (Boston: Little, Brown & Company, 1974), esp. chs. 3 and 8; idem, "Present-Orientedness and Crime", in: R.E. Barnett/J. Hagel, eds., *Assessing the Criminal* (Cambridge: Ballinger, 1977); Wilson & Herrnstein, *Crime and Human Nature*, pp.414-424.

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to total war, and the 20th century, the age of democracy, must be ranked also among the most murderous periods in all of history.[42]

Thus, inevitably two final questions arise. The current state of affairs can hardly be "the end of history". What can we expect? And what can we do? As for the first question, the answer is brief. At the end of the 20th century, democratic republicanism in the U.S. and all across the Western world has apparently exhausted the reserve fund that was inherited from the past. For decades, real incomes have stagnated or even fallen.[43] The public debt and the cost of social security systems have brought on the prospect of an imminent economic meltdown. At the same time, societal breakdown and social conflict have risen to dangerous heights. If the tendency toward increased exploitation and present-orientedness continues on its current path, the Western democratic welfare states will collapse as the East European socialist peoples' republics did in the late 1980s. Hence one is left with only the second question: What should be done *then*; or what can we do *now* in order to prevent the process of civilizational decline from running its full course to an economic and social catastrophe?

First, the idea of democracy and majority rule must be delegitimized. Ultimately, the course of history is determined by *ideas*, be they true or false. Just as kings could not exercise their rule unless a majority of public opinion accepted such rule as legitimate, so will democratic rulers not last without ideological support in public opinion.[44] Likewise, the transition from monarchical to democratic rule must be explained as fundamentally nothing but a *change* in public opinion. In fact, until the end of WW

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[42] On the contrast between monarchical and democratic warfare see J.F.C. Fuller, *The Conduct of War*, esp. chs. 1 and 2; idem, *War and Western Civilization* (Freeport: Books for Libraries, 1969); M. Howard, *War in European History* (Oxford: Oxford University Press, 1976), esp ch.6; idem, *War and the Liberal Conscience* (New Brunswick: Rutgers University Press, 1978); B. de Jouvenel, *On Power*, ch.8; W.A. Orton, *The Liberal Tradition* (Port Washington: Kennikat Press, 1969), pp.251ff; G. Ferrero, *Peace and War*, ch.1.

[43] For a revealing analysis of U.S. data see R. Batemarco, "GNP, PPR, and the Standard of Living", *Review of Austrian Economics*, vol.1, 1987.

[44] On the relation between government and public opinion see the classic expositions by E. de la Boetie, *The Politics of Obedience: The Discourse of Voluntary Servitude* (New York: Free Life Editions, 1975); D. Hume, *Essays. Moral, Political, and Literary* (Oxford: Oxford University Press, 1963), esp. Essay IV: Of the First Principles of Government.

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I, the overwhelming majority of the public in Europe accepted monarchical rule as legitimate.[45] Today, hardly anyone would do so. On the contrary, the idea of monarchical government is considered laughable. Consequently, a return to the 'ancien regime' must be regarded as impossible. The legitimacy of monarchical rule appears to have been irretrievably lost. Nor would such a return be a genuine solution. For monarchies, whatever their relative merits, do exploit and *do* contribute to present-orientedness as well. Rather, the idea of democratic republican rule must be rendered equally if not more laughable, not in the least by identifying it as the source of the ongoing process of de-civilization.

But secondly, and still more importantly, at the same time a positive *alternative* to monarchy *and* democracy — the idea of a natural order — must be spelled out and understood. On the one hand, and simply enough, this involves the recognition that it is not exploitation, either monarchical or democratic, but private property, production, and voluntary exchange that are the ultimate source of human civilization. On the other hand, psychologically more difficult to accept, it involves the recognition of a fundamental sociological insight (which incidentally also helps identify precisely where the historic opposition to monarchy went wrong): that the maintenance and preservation of a private property based exchange economy requires as its sociological presupposition the existence of a voluntarily acknowledged 'natural' elite — a *nobilitas naturalis*.[46]

The natural outcome of the voluntary transactions between various private property owners is decidedly non-egalitarian, hierarchical and elitist. As the result of widely diverse human talents, in every society of any degree of complexity a few individuals quickly acquire the status of an elite. Owing to superior achievements of wealth, wisdom, bravery or a combination thereof, some individuals come to possess 'natural authority', and their opinions and judgments enjoy wide-spread respect. Moreover, because of selective mating and marriage and the laws of civil and genetic inheritance, positions of natural authority are more likely than not passed on within a few — noble —families. It is to the

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[45] As late as 1871, for instance, with universal male suffrage, the National Assembly of the French Republic contained only about 200 republicans out of more than 600 deputies. And the restoration of a monarchy was only prevented because the supporters of the Bourbons and the Orleans checkmated each other.

[46] See also W. Röpke, *Jenseits von Angebot und Nachfrage* (Bern: P.Haupt, 1979), pp.191-199; B. de Jouvenel, *On Power*, ch.17.

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heads of these families with long-established records of superior achievement, farsightedness, and exemplary personal conduct, that men turn with their conflicts and complaints against each other, and it is these very leaders of the natural elite who typically act as judges and peacemakers, often free of charge, out of a sense of obligation required and expected of a person of authority or even out of a principled concern for civil justice, as a privately produced "public good".[47]

In fact, the endogenous origin of a monarchy (as opposed to its exogenous origin via conquest)[48] cannot be understood except before the background of a prior order of natural elites. The small but decisive step in the transition to monarchical rule — original sin — consisted precisely in the *monopolization* of the function of judge and peacemaker. The step was taken, once a single member of the voluntarily acknowledged natural elite — the king — could insist, against the opposition of other members of the social elite, that all conflicts within a specified territory be brought before him and conflicting parties no longer choose any other judge or peacekeeper but him. From this moment on, law and law enforcement became more expensive: instead of being offered free of charge or for a voluntary payment, they were financed with the help of a compulsory tax. At the same time, the quality of law deteriorated: instead of upholding the pre-existing law and applying universal and immutable principles of justice, a monopolistic judge, who did not have to fear losing clients as a result of being less than impartial in his judgments, could successively alter and pervert the existing law to his own advantage.

It was to a large extent the inflated price of justice and the perversions of ancient law by the kings which motivated the historical opposition against monarchy. However, confusion as to

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[47] See also M. Harris, *Cannibals and Kings. The Origins of Culture* (New York: Vintage Books, 1977), pp.104ff on the private provision of public goods by "big men".

[48] As a comparative evaluation of theories of the endogenous versus the exogenous origin of government and a historical critique of the latter as incorrect or incomplete see W. Mühlmann, *Rassen, Ethnien, Kulturen* (Neuwied: Luchterhand, 1964), pp.248-319, esp. pp.291-296.

For proponents of theories of the exogenous origin of government see F. Ratzel, *Politische Geographie* (München, 1923); F. Oppenheimer, *System der Soziologie. Vol. 2: Der Staat*; A. Rüstow, *Freedom and Domination* (Princeton: Princeton University Press, 1980).

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the causes of this phenomenon prevailed. There were those who recognized correctly that the problem lay with *monopoly*, not with elites or nobility.[49] But they were far outnumbered by those who erroneously blamed it on the elitist character of the ruler instead, and who accordingly advocated to maintain the monopoly of law and law enforcement and merely replace the king and the visible royal pomp by the "people" and the presumed modesty and decency of the "common man". Hence the historic success of democracy.

Ironically, the monarchy was then destroyed by the same social forces that kings had first stimulated when they began to exclude competing natural authorities from acting as judges. In order to overcome their resistance, kings typically aligned themselves with the people, the common man.[50] Appealing to the always popular sentiment of envy, kings promised the people cheaper and better justice in exchange and at the expense of taxing — cutting down to size — their own betters (that is, the kings' competitors). When the kings' promises turned out to be empty, as was to be predicted, the same egalitarian sentiments which they had previously courted now focused and turned against them. After all, the king himself was a member of the nobility, and as a result of the exclusion of all other judges, his position had become only more elevated and elitist and his conduct only more arrogant. Accordingly, it appeared only logical then that kings, too, should be brought down and that the egalitarian policies, which monarchs had initiated, be carried through to their ultimate conclusion: the monopolistic control of the judiciary by the common man.

Predictably, as explained and illustrated in detail above, the democratization of law and law enforcement — the substitution of the people for the king — made matters only worse, however. The price of justice and peace has risen astronomically, and all the while the quality of law has steadily deteriorated to the point where the idea of law as a body of universal and immutable principles of justice has almost disappeared from public opinion and has been replaced by the idea of law as legislation (government-*made* law). At the same time, democracy has succeeded where monarchy only made a modest beginning: in the ultimate destruction of the natural

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[49] See, for instance, G. de Molinari, *The Production of Security* (New York: Center for Libertarian Studies, 1977), published originally in 1849, in French.

[50] See on this also H. Pirenne, *Medieval Cities* (Princeton: Princeton University Press, 1974), esp. pp.179-180, and pp. 227f; B. de Jouvenel, *On Power*, ch.17.

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elites. The fortunes of great families have dissipated, and their tradition of a culture of economic independence, intellectual farsightedness, and moral and spiritual leadership has been lost and forgotten. Rich men still exist today, but more frequently than not they owe their fortune now directly or indirectly to the state. Hence, they are often more dependent on the state's continued favors than people of far lesser wealth. They are typically no longer the heads of long established leading families but 'nouveaux riches'. Their conduct is not marked by special virtue, dignity, or taste but is a reflection of the same proletarian mass-culture of present-orientedness, opportunism, and hedonism that the rich now share with everyone else; and consequently, their opinions carry no more weight in public opinion than anyone else's.

Hence, when democratic rule has finally exhausted its legitimacy the problem faced will be significantly more difficult than when kings lost their legitimacy. Then, it would have been sufficient by and large to abolish the king's monopoly of law and law enforcement and replace it with a natural order of competing jurisdictions, because remnants of natural elites who could have taken on this task still existed. Now, this will no longer be sufficient. If the monopoly of law and law enforcement of democratic governments is dissolved, there appears to be no other authority to whom one can turn for justice, and chaos would seem to be inevitable. Thus, in addition to advocating the abdication of democracy, it is now of central strategic importance that at the same time ideological support be given to all decentralizing or even secessionist social forces; that is, the tendency toward political centralization that has characterized the Western world for many centuries, first under monarchical rule and then under democratic auspices, must be systematically reversed.[51] Even if as a result of a secessionist tendency a new government, whether democratic or not, should spring up, territorially smaller governments and increased political competition will tend encourage moderation as regards exploitation. And in any case, only in small regions, communities or districts will it be possible again for a few individuals, based on the popular recognition of their economic

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[51] On the political economy of political centralization, and the rationale of decentralization and secession, see H.H.Hoppe, "Against Centralization", *Salisbury Review*, June 1993; idem, "Migrazione, centralismo e secessione nell'Europa contemporanea", *biblioteca della liberta*, no.118, 1992; J.Baechler, *The Origins of Capitalism* (New York: St.Martin's Press, 1976), esp. ch.7.

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independence, outstanding professional achievement, morally impeccable personal life, and superior judgment and taste, to rise to the rank of natural, voluntarily acknowledged authorities and lend legitimacy to the idea of a natural order of competing judges and overlapping jurisdictions — an 'anarchic' private law society — as the answer to monarchy *and* democracy.

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FROGS' LEGS, SHARED ENDS and THE RATIONALITY OF POLITICS

*by A. de Jasay**

Politics asks "What is to be done?" and proposes a profusion of answers. Philosophy, when set to contend with politics, asks "when can one sensibly say that something, or for that matter anything, is to be done?"[1] That answers to this question are neither wholly formal, logical and semantic, nor wholly empirical and technological, but both, and more than either, is, I think, plain enough. Isaiah Berlin's grand sweep through our *Geistesgeschichte* is a salutary reminder that this was not always plain to all; that political theory is a discipline in its own right; and that it feeds on both rationality and morality.[2] In a recent essay, Vincent Descombes argues that some currents of modern philosophy have concocted poor dishes from such rich ingredients.[3] Thin gruel does not take them far: "justificationist" philosophy (*Begründungsphilosophie*) reduces politics to a problem of individual morality,[4] while the "decisionist", who will not willingly concede either rationality or morality to his political ends, leaves *partis pris,* commitments to whim and sheer accident.[5] If political philosophy had real content, Descombes claims that it could prove to any rational person that, say, being a Nazi is the same kind of gross

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[1] On this loose definition, ethics, social choice theory, welfare economics, jurisprudence, and bits of game theory will all, at one time or another, turn out to be vital parts of political philosophy. I adopt the definition advisedly, to produce this broad result.

[2] Isaiah Berlin, "La théorie politique existe-t-elle?" *Revue Française de Science Politique* 11, 1961, reproduced in Isaiah Berlin, *Concepts and Categories* (London: The Hogarth Press, 1978).

[3] Vincent Descombes, "Philosophie du jugement politique", *La Pensée Politique* (Paris, Vol. 2).

[4] Descombes, p. 156.

[5] Descombes, p. 138.

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mistake as to hold that 2 + 2 = 5. But this it patently fails to prove.[6] However, these and other intricate arguments of his seem to support no identifiable proposition about what reason does, could do, or ought to do in politics.

Ars politica

Much as one may sympathize with Descombes' critique of justificationism as redundant, existentialism as absurd, and much of modern political philosophy as talk in a talking shop, he seems to put forward no recognizable thesis about the rationality or otherwise of collective agendas in general. It is not clear how he would have us use reason to judge and rank-order political alternatives. His Aristotelian call for an "architectonic" *ars politica,* taking account of the "structure of human activities" that have their due place in the *cité*[7] is discouragingly obscure. We are asked to respect the intrinsic purposes and orderly interdependence of men's social functions — a call all would no doubt agree to heed. What, however, if we do heed it? Supposedly, we are then committed to treat literally everything as political in one aspect, and also as non-political in another.[8] An example is needed to make this puzzle intelligible. It is not for politics to tell the doctor who is well and who is ill (nor how ill, needing how much medical attention), but it is for politics to say how many doctors there should be.[9] Yet, this cannot be right. Politics cannot with impunity decide the number of doctors (unless by "decide" we lamely mean "respond to medical needs") without also "deciding"the number of patients, and how ill they are. If doctors are to have enough patients and patients enough doctors, either both decisions must be collective (doctors and patients matched by the same *fiat* or the same political bargain), or both must be individual (the match between them emerging from the usual supply-demand adjustment processes). One of these solutions might be thought dictatorial, the other "anti-social",[10] but at least

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[6] Descombes, p. 138.

[7] Descombes, p. 154.

[8] Descombes, pp. 152-154.

[9] Descombes, pp. 152-154.

[10] Note that neither solution need be wholly pure: their logic admits an alien element. In the "dictatorial" solution, the rich may buy themselves more medical care than is allocated by the dictator. In the "emergent" (market) solution, the charitable rich may buy (and the uncharitable made to buy) more

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both provide for balance and order. A hybrid of the two is internally inconsistent, generating disorder and deficit, and no "structure-based" *ars politica* can make it fit the intrinsic purpose and content of human activities in the *cité* or anywhere else.

La plus belle fille ...

Much of the old confusion we deplore in political theory, and much of the fresh confusion we spread when trying to get rid of what has been spread, springs from false notions of what rationality is and what it does. Rather like the proverbial loveliest girl who can only give what she has, rationality cannot be pushed to give the meta-rational. If it is pushed, it must disappoint the pusher. It is the miscasting of it in wrong roles, rather than rationality itself, that Oakeshott really blames in his classic indictment.[11] His main charge, however, is directed at cognitive presumption, at baseless and naive claims of knowledge, understanding and foresight, in short, at the temptation to overrate the "technology" of employing reason in politics.[12] Quite apart from the technological obstacle, which I shall leave on one side, however, there is a non-empirical conundrum which, though equally well know, is often lost sight of.

At its lowest, rationality is an attribute of such thought and speech as conforms to the conventions of logic and grammar; thus, most people would call self-contradictory statements *non sequitur* deductions, and intransitive rank-orderings irrational. More ambitiously, rationality is also a condition of the validity of the hypothetical imperatives of the form "if you want the end E, you must do, possess, employ, sacrifice the set of means m". The

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medical attention for the poor than the latter could afford. These kinds of intrusions are impurities in an otherwise consistent system. That the number and gravity of illnesses should be decided by doctors in one forum, the number of doctors in another, would be systemic inconsistency.

[11] M. Oakeshott, *Rationalism in Politics* (London: Methuen and Co., 1962).

[12] Karl Popper believed that the risk of doing so could be greatly reduced, and the technology itself developed and confirmed, by "piecemeal social engineering"(Popper, 1961 III.21, 1962, II.). By piecemeal, he did *not* mean small scale ("...we have put no limits to the scope of the piecemeal approach", 1961, p. 68.). Piecemeal, for him, was not the opposite of large scale, but of utopian or holistic. Like the proof of the pudding, the test of holistic engineering was that "...it turns out to be impossible" (ibid.). Piecemeal, then, is what is possible and works, and we shall know that our social engineering was piecemeal when we see that it has worked.

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specification of *m* is the task of practical inference. If *m* gets *E*, a necessary condition of rationality is satisfied; if *m* gets us *E* more efficiently than any other available *m'*, a sufficient condition is satisfied. But was it rational to want *E* to start with?

Note in passing that while some "value" is an attribute of some end, often the end is so strongly characterized by an associated value that the two words can be used interchangeably; sometimes we "pursue a value" no less than we "seek an end", when we employ some means. "An equal distribution" is an end; it carries the value of "equality".

By positing the rationality of ends or values *(Wertrationalität)* as well as of the means, or instrumental rationality *(Zweckrationalität)*, Max Weber has lent authority to the bad habit of ascribing rationality to ends (or their values). That this form of "justificationism" or "foundationism" is impossible is, by now, a commonplace: for what enables us to say that *E* is rational is that we have at least one good reason to seek it; this reason functions as a further end *E'*, with respect to which *E* is a ("rational") means; its rationality or otherwise is a function of its instrumental role in achieving the further end *E'*. If the latter is rational, it is because it achieves *E''*. Thus, we construct a regress *E*, *E'*, *E''*, etc. Each member of it is justified as rational by backward induction from the last member that anchors the regress. The last member, of course, is by definition a final end that escapes backward induction; nothing is left over that would permit us to say that it is rational or not. The generalized attempt to say it presupposes an infinite regress.

Any finite regress of ends is *ended* by a final *end* or value, about which it is futile to ask to what else it leads, what comes after it, for what reason we pursue it. If the question were not futile, the end would not be final, non-instrumental. Since not every reason can have a further reason, the scope of rationality in choosing actions is strictly limited.

A set of practical inferences, forming a regress, has a very revealing common feature with a Gödelian formula for a logistic calculus: no matter how all-embracing is the set of sentences it represents, by Gödel's theorem it must always contain at least one "undecideable" sentence that cannot be proven within *that* system of logistic calculus. By making the system more all-embracing, we can prove the sentence only to find that the larger system now contains another undecideable sentence that cannot be proved within *that* system, and so on *ad infinitum*. No Gödelian system can out-Gödel

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itself.[13] The analogy between the final end and the undecideable sentence is not perfect, but it does not need to be to illuminate our point.

To each, his own values

The solution seems evident enough: the regress must be cut short somewhere. If prolonging it is futile, the sooner it is cut short, the better. Yet something is amiss with this attractive conclusion. Some ends are good cutoff points, but at others basic moral conventions insist that we prolong the regress.

If the ends we want is frogs' legs, the rational means is to buy some, or perhaps to go to the restaurant where they do them properly. Whether it is rational to want frogs' legs at all is a silly question that provides silly answers: we want frogs' legs (E) because we like to eat them (E'), and we like to eat them because they taste good (E''). No harm is done by cutting off this chain of boring inferences early on, and little purpose would be served by proving that the taste for frogs' legs is a rational one. Ethically, there is nothing *prima facie* wrong with taste-relativism, that puts tastes beyond dispute.

The same can hardly be said about value-relativism. "To each, his own value" can be defended, and it is the attacks that beg ethical questions, as long as the values concerned, and the ends which carry them, are *divisible*, so that an individual can have his without another individual being obliged to share it, too. However, some values are indivisible, or holistic, and cannot be attained by anyone unless they are attained by everyone, regardless of who wants them and who does not. If I value equality, and seek by political means a less unequal distribution of wealth, status or privilege in my community, everybody must enjoy, or endure, a more equal distribution if I am to enjoy equality. Unlike frogs' legs that can but need not be shared, equality *must* be shared, and those who are made to share it involuntarily are morally entitled to a better reason than that, for me, equality is a final value.

If so, it is now incumbent upon me to build a regress. I may find instrumental reasons: equality is the efficient or perhaps the sole means to stable property relations, social peace and harmony, and these in turn are indispensable means to the good life that all

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[13] J. R. Lucas, *The Freedom of the Will*, (Oxford: The Clarendon Press, 1970), pp. 524-526.

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sane persons must want. Or else, I could try moral arguments: it is shameful that some should have so much and others so little, and even coercion is justified to put an end to such mutual degradation.

Instrumental reasons are true or false, moral ones right or wrong. However, only instrumental reasons can be proper inferences. Only they can, subject to the availability of empirical evidence in favour of the inference, be *intersubjectively* compelling, so that anyone confronted with the same evidence must in good faith accept them as the means to agreed ends.

So far, so good. What is rational must be intersubjectively so. Let us therefore set a necessary condition of rational politics: if someone advances an end that is political in the precise sense that its achievements is more than his private affair, because it generates unwanted externalities for others, we have a moral claim to a demonstration of its rationality. This can, of course, only be done by backward induction from another, more nearly final, agreed end. Failing that, claims of rationality must be abandoned in favour of other claims, perhaps those of morality. Backward induction requires a cutoff point from which to start moving backward. Can political philosophy specify cutoff points that cannot, in good faith, be rejected? And can the specification work as a reliable filter, purifying political agendas, leaving high and dry all the presumptuous goals that cannot be intersubjectively defended?

The Aryan University

A Nazi Rector is recruiting a third-rate faculty, he suppresses unbiased research, selects students by racial criteria, and devalues the academic standing of his University. Descombes argues that since what a good Rector (or a good soldier, a good doctor, a good father) must do is defined by the intrinsic purpose of the rectorial function, a Nazi Rector is a contradiction in terms. The attempt to trick a Nazi, or for that matter (as he might have added), a socialist, into self-contradiction, the way Hilary Putnam suggests one could do, by making him explicate Nazism or socialism as instrumental ends, and provide *reasons* - reasons that are bound to lose themselves in incoherence and absurdity - *why* Jews should be persecuted or the "means of production" expropriated, must fail if the Nazi or socialist after a few feeble steps along a poorly constructed regress of instrumental ends, cuts off the intellectual torture, and seeks refuge in a non-rational final end. He can flatly state that, for him, the purity and supremacy of the Aryan "race", or

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the end of exploitation, are final ends that it is neither necessary nor possible to derive from something else.

Descombes holds that what the Nazi or the socialist, with no proper place and no defined function in society, can claim, the Nazi Rector (or general, doctor, paterfamilias, etc.), with his tasks embedded in the "structure" of the *cité*, cannot claim. He will get caught in the self-contradiction implicit in any attempt at being both a good Rector and a good Nazi. But what exactly is this double attempt he is making? Why must it exclude tradeoffs, especially when it is the very "structure" of *his* ideal Nazi or socialist *cité* that calls for them? For it is no more incumbent upon a Rector, whether Nazi or not, to treat the intrinsic purposes of academic rectorship as his single categorical imperative, than it is for the general to win the battle at any cost, or for the father to always put his children first. Why cannot the Rector argue that educating and training dull Aryan or working-class boys and girls, rather than clever Jewish or bourgeois ones, and directing research into patriotic and socially salutary channels, may make for a lesser University, more modest advances in knowledge, but a better, "healthier", more just society? Is not this, in a minor key, the argument underlying the "positively discriminating" admissions policies of American universities today? I happen to find such positions repugnant, and believe that they soon prove to be slippery slopes, but I do not see how they can be intersubjectively rebutted.

The Refuge in the Common Good

Since only instrumental ends are open to the critical test of rationality by practical inference, the Nazi Rector and his ilk, that is all who use politics as the efficient means for imposing their values on others, will, when pressed to justify their ambition, climb along the rising regress of ever more distant ends, until they reach what is, like patriotism for Dr. Johnson's scoundrel, their ultimate refuge: the common good. It is tautologically the final end of politics; nothing else can or is needed to justify it. The content and drift of political philosophy depends to no small extent on whether it admits the concept of the common good, or rules it out as gobbledygook.

When trying to decide which it is to be, we are wrestling with what seems to me to be several distinct version of what the concept might be intended to mean. I could identify at least three; none of these are rational or irrational. None, however, are totally impervious to the acid of analytical reasoning.

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By the first concept, that could best be labeled mystical, the common good is not the good of all, nor anybody's in particular: it is genuinely non-derivative. It need neither be good *for*, nor desired *by*, any individual, past, present or future. Its goodness, independent as it is from anybody's prudential interest, "subjective" preference or right, is recognized directly, without reference to empirical evidence; it is found by cognitivist meta-ethics. The concept is liable to turn up in some religious or millenarian guise. A strongly held common faith, a shared millenarian vision, may inspire a unique (but hardly a *complete*) view of the common good. Cognitive efforts to arrive at moral truths are quite unlikely to do so in a world where men differ and their interests conflict. Any unique view they may produce is liable to be incomplete, partial, pronouncing only on the few non-conflictual features of alternative states of affairs.

My second version is communitarian. It postulates a good state of affairs that is good *for*, in the interest of, or desired by, some community, without this postulate having to be substantiated by reference to its members. It is not subject to any unanimity or even majority test.[14] Instead, it is arrived at by treating the community as an indivisible holistic entity, as if it had a unitary personality, disposing of the means possessed by its members, having its proper will and interests, and engaging in practical reasoning to fit means to ends rationally. This "as if" manner of defining the common good is, in fact, always somebody's reading of the community's putative mind. The reading will rely on the reader's privileged insight into the community's history, culture, and the future it can at least partly shape by its own will. Needless to say, no two readings of this kind need coincide.

The third possible concept is aggregative, a sum composed of individual components, and called the *sum* of the good of some polity's members, *hence* the common good. Since individual members are in principle capable of saying, or otherwise revealing, what they consider good and better (both for themselves and, if they care, for others), they can provide some factual evidence to support

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[14] Strictly, of course, unlike unanimity, a "majority test" tests not what the community does or does not deem good. At best, it only tests what a majority within it deem good. Moreover, as has been known since Condorcet, majority tests are liable to generate self-contradictory, incoherent results when used to order more than two alternatives as good, better, best — which is hardly apt to enhance our respect for the test.

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the identification of a state of affairs as the common good. The evidence can ostensibly be made to go even further, and serve to establish rank-orderings of states of good, better, etc. for the polity, the *cité* "as a whole". Thus, the aggregative version has the singular distinction of claiming to describe, to find a fact. At least implicitly, it aspires to falsifiability.

However, for aggregation, the components must be both commensurate (so that anyone can tell whether my good is greater, as great as, or lesser than yours), and their differences must be cardinally measurable (so that anyone can tell *by how much* my good is greater than yours). There is no basis for supposing either to be the case. The technical literature has heavily laboured the second of the two, although the first is both logically prior to it and morally far more fundamental. Yet unless both suppositions are made, that is unless comparisons are both interpersonal and cardinal, individuals' orderings cannot be added together to produce one complete common ("social") ordering. "Starting with Arrow's famous impossibility theorem, authors have formulated seemingly reasonable conditions that a preference aggregation procedure ought to satisfy, and then proved that the conditions are logically inconsistent."[15] No matter whether individuals order states of affairs by preference, prudential interest, or moral worth, the same comparability conditions apply throughout, and derivation of the common good by aggregations of individual orderings remains an impossible, or rather a nonsensical exercise. If a "social" ordering, putatively identifying the common good, is nonetheless produced, it is necessarily the product, not of arithmetic exploits, but of a set of value judgments concerning the relative weights deserved by individual orderings.

It is no use protesting that no such value judgments are in effect carried out, for whether they are explicit or implicit, they are entailed in the common ordering. Any political decision that, by invoking the common good, overrides the will and wishes of some to satisfy others, is the execution of a value judgment about individual wills and wishes. The more vulgar kinds of claims about the common good, of course, often masquerade as truth-claims. However, they cannot describe. They can only express preferences. They are

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[15] A. Hylland, "Subjective Interpersonal Comparison", in J. Elster and J. E. Roemer, eds., *Interpersonal Comparisons of Well-Being* (Cambridge: Cambridge University Press, 1991), p. 336.

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unfalsifiable, forever bound to remain my say-so against your say-so.

Needless to say, value judgments as such are not disreputable. What is disreputable is to dress them up as findings of fact, for which evidence could in principle be found, or (as the classical utilitarians imagined) as the products of rational thought, deduced from self-evident propositions.[16] It is perfectly possible for me to share your value judgments, but it is never intersubjectively compelling for you to share mine, never a matter of straight practical inference, and never a bow to the rules of rationality. Only some partial orderings, capable of withstanding the Paretian test, get by without my say-so having to prevail over yours.

What is not to be done, nor said

What is left for political philosophy "rationally" to say about what is to be done? Very little, it would seem. Means are suitable subjects for rational examination, once the ends are given. But *political* ends are either means in disguise, and presuppose other tacit ends looming beyond them, or they collapse into the common good; yet all versions of the common good we can easily identify raise the suspicion that nothing can be said about them that could survive intersubjectively.

A good deal, however, is left to be said about what is *not* to be done, and said, and why. Nine parts of practical politics is the making of non-unanimous decisions by some, that hurt others. Do we really want such decisions imposed as rational means to ends that are ultimately neither rational nor irrational, and must be posited by brazen assertion, mystical communion with the good, or occult value-comparisons between persons? Pareto-optimal outcomes offer a minimal morally legitimate space for a minimal state, and no more. Surely, it tells something about the ontology of politics that logic, morality, or both lend themselves so much better to condemning political action than to defending its legitimacy.

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[16] The "diminishing marginal utility of income" was long treated as either self-evident, or requiring only minimal psychological assumptions supported by introspection. Interestingly, the maximin strategy rational individuals in the "original position" are predicted by the anti-utilitarian Rawls to adopt, presupposes the same kind of psychological disposition. It is tantamount to a "diminishing marginal importance of primary goods", over and above some minimum. Unsurprisingly, it generates the same kind of egalitarian norm, a social "ought" deduced from a psychological "is".

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LEGISLATION AND THE DISCOVERY OF LAW IN A FREE SOCIETY

*N. Stephan Kinsella**

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Justice must stand quite still, or else the scales will waver and a just verdict will become impossible.

—Franz Kafka[1]

I. Introduction

Libertarians' devotion to individual rights, and to laws in support of those rights, is unquestionable. Most of the laws favored by libertarians can be shown to be consistent with our individual rights — unlike the blatantly illegitimate laws advocated by socialists. Despite this, however, many libertarians overlook important procedural or structural requirements that must accompany any legal system in which substantively justifiable law can develop and last.

In particular, the danger and futility of making law by *legislation* is too often ignored, even by libertarians (other than anarcho-capitalists, who oppose the existence of any government on principle, including its legislature). Libertarians often, for example, advocate that the legislature enact this or that law, or they at least support many statutes that are already in force, such as statutes prohibiting murder. The concept of separation of governmental powers into the legislative, executive, and judicial branches, which many libertarians support, implies that legislation can be a valid function of a libertarian government. But as the late Italian legal theorist Bruno Leoni noted in 1961:

> It is ... paradoxical that the very economists who support the free market at the present time do not seem to care to consider whether a free market could really last within a legal system centered on legislation.[2]

Leoni argued that legislation as such is incompatible with freedom. If this is correct, then even statutes that seem to embody libertarian principles simultaneously subvert those principles. There is another way forming law, however — in which law is "found" rather than "made" — which does not depend on legislation or

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[1]FRANZ KAFKA, THE TRIAL 146 (New York: Schocken Books, Definitive ed. 1984, Willa and Edwin Muir, trans. 1956).

[2]BRUNO LEONI, FREEDOM AND THE LAW 23 (Indianapolis: Liberty Fund, expanded 3d. ed. 1991) (1961); *see also id.* at 89.

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legislators. This is the way of decentralized legal systems such as customary law, Roman law, and the common law.

In this article I will examine the two ways of forming law — centralized (i.e., legislation-based) and decentralized — and will argue that only the latter is compatible with libertarian principles. I will also examine the proper role for legal codification in light of this conclusion.

II. Centralized and Decentralized Legal Systems

A. Civil Law and Common Law

In modern times the two dominant legal systems are the common law and the civil law. Based on the body of English case law that developed gradually over the centuries, the common law spread to English colonies and commonwealths like America, Canada, and Australia. Modern civil law systems are based on Roman law, which, like the common law, developed many of its important legal principles in the accumulated decisions of jurists in thousands of cases.[3] Virtually all of Europe and many other jurisdictions, including Louisiana, Puerto Rico, and Quebec, have a civil-law system.

In the common law and Roman law, there eventually evolved very sophisticated bodies of legal principles, concepts, methodology, and precedents. Because the classical common law and Roman law developed the large bulk of their legal principles through the decision and discussion of cases, they serve as rough examples of decentralized systems of "judge-found" law, as do largely private customary law systems like the Law Merchant.[4]

Unlike Roman law and the common law, however, modern civil law principles are embodied in a statute called a Civil Code, and the

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[3]*See infra* notes 33 and 74, and accompanying text.

[4]The expression "judge-found" will be used throughout this article, rather than the more popular and positivistic phrase "judge-made." I will use the generic phrase "judges" often to refer to the relevant expert decision maker, whether judge, jurist, or private arbitrator, in situations where the relevant discussion applies to decentralized legal systems such as the common law, Roman law, and private law. Although Roman and common law were not based solely on the decisions of judges, for illustrative purposes I will focus on this characteristic as their primary way of finding law.

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civil law enshrines legislation as the primary source of law.[5] The modern civil law is thus a good example of an explicitly centralized legal system, even though much of the substantive provisions of civil codes are based on legal principles discovered in decentralized fashion in Rome many centuries ago. Roman law thus has more in common with the common law and customary law than with the Roman law's offspring, modern civil law, since the former were decentralized law-finding systems, while the latter are centralized, legislation-based law-*making* systems.[6] Today's common law, while based on the classical and mostly decentralized Anglo-American common law, is also coming to be more and more dominated by legislation, and, to that extent, is gradually being centralized as well.

Thus, previously, law was thought of as a body of true principles ripe for discovery by judges, not as whatever the legislator decreed. Nowadays, however, legislation has become such a ubiquitous way of making law that "the very idea that the law might not be identical with legislation seems odd both to students of law and to laymen."[7] And, one might add, to many libertarians. As discussed below, however, a legislative system is incompatible with libertarian principles and destroys true Law. This holds true for all legislation-based legal systems, even civil law systems, which

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[5]Legislative supremacy is announced in the very first articles of the Louisiana Civil Code. Article 1 provides that "The sources of law are legislation *and* custom," but article 3 makes it clear that legislation is dominant and supreme: "Custom may not abrogate legislation." La. Civ. Code art. 1 (emphasis added); art. 3. *See also* SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 17 (Louisiana Bar Foundation, 1993). Louisiana's civil law is derived in large part from Spanish and French and, ultimately, Roman sources. For discussion of the Louisiana Civil Code, its history, and related issues, see Herman, *supra*. Differences in terminology between Louisiana's civil-law system and common-law legal systems are discussed in N. Stephan Kinsella, *A Civil Law to Common Law Dictionary*, 54 LA. L. REV. 1265 (1994). A general comparison of civil and common law is found in W.W. BUCKLAND & ARNOLD D. MCNAIR, ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE (Cambridge, England: University Press, 2d ed., revised by F.H. Lawson, reprinted with corrections 1965).

[6]For more discussion of the gradual method of developing law in the Roman and common law and of these systems' relative similarity, see Peter G. Stein, *Roman Law, Common Law, and Civil Law*, 66 TUL. L. REV. 1591, 1592 (1992); Buckland & McNair, *supra* note 5, at xiv.

[7]Leoni, *supra* note 2, at 6.

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typically embody fairly libertarian principles, much as the original body of common law does. Although the civil codes of civil law systems codify, in elegant form, principles developed in the relatively decentralized Roman legal system, civil codes are still merely statutes in a system in which legislation is the primary source of law. Thus even civil codes, the most elegant and liberal exemplars of centralized legislation, are subject to the general criticism of legislation presented in this article.

B. Civil Law, Rationalism, and Libertarianism

Before concluding this section and proceeding to general criticisms of legislated law, I want to briefly note the tendency of civilians to regard the civil law as a great "rationalist" system.[8] Civilians consider modern civil law to be "rational" or even "rationalistic" for various reasons, including the views that civil law: is rationally and systematically codified,[9] rather than "unscientifically" developed in an uncoordinated fashion by

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[8]*Rationalism* has been defined as

> the doctrines of a group of philosophers of the 17th and 18th centuries, whose most important representatives are Descartes, Spinoza, and Leibniz. The characteristics of this kind of rationalism are: (a) the belief that it is possible to obtain by reason alone a knowledge of the nature of what exists; (b) the view that knowledge forms a single system, which (c) is deductive in character; and (d) the belief that everything is explicable, that is, that everything can in principle be brought under the single system.

ANTONY FLEW, A DICTIONARY OF PHILOSOPHY 298-99 (New York: St. Martin's Press, rev'd 2d ed., 1984). For an illuminating discussion of rationalism, see Hans-Hermann Hoppe, *In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's The Rhetoric of Economics*, 3 REV. AUSTRIAN ECON. 179 (1989).

[9]*See, e.g.*, Herman, *supra* note 5, at 11-16; Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 996 *et seq.* (1980) (discussing in Part III "The Contribution of the Enlightenment: A Drive to Systematization"); Stein, *supra* note 6, at 1594-95; and Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 645, 646, 652 (1977). *See also* GIOVANNI SARTORI, DEMOCRATIC THEORY 231-37, 245-56 (Westport, Connecticut: Greenwood Press, 1962) (discussing the political rationalism of the continental legal system).

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decentralized judges; is "certain" and clear because the rules are written;[10] and is proclaimed by the legislator. Civil law systems such as the Louisiana and French systems are also praised as being drafted "in the spirit of the Enlightenment,"[11] and as resting on an ideological commitment to democracy,[12] economic liberalism,[13] private property,[14] freedom of contract,[15] individualism,[16] natural law,[17] and justice.[18]

Most libertarians would agree that such virtues are genuinely justifiable and thus ought to be supported by any legitimate legal system. Moreover, civilians are also correct that these liberal principles are consistent with rationalism, because libertarian principles can also be justified with rationalist arguments.[19]

Under the libertarian conception of individual rights, the virtues typically cited in favor of the civil law are certainly necessary requirements of a just legal system. The virtues of economic

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[10]*See* Part III.B, *infra*.

[11]*See, e.g.*, Herman, *supra* note 5, at 12.

[12]*See, e.g., id.* at 12. However, "democracy" is nothing more than majoritarianism—i.e., mob rule—which does not deserve unqualified praise and thus does not belong in the same class as the other virtues listed above. *See infra* notes 20 and 79 and accompanying text (discussing some deficiencies of democracy).

[13]*See, e.g., id.* at 12.

[14]*See, e.g., id.* at 15.

[15]*See, e.g.*, Herman, *supra* note 5, at 15.

[16]*See, e.g.*, Cueto-Rua, *supra* note 9, at 652.

[17]*See, e.g.*, ALAN WATSON, THE MAKING OF THE CIVIL LAW 68 (Cambridge, Massachusetts and London: Harvard University Press, 1981); Cueto-Rua, *supra* note 9, at 652.

[18]*See, e.g.*, Cueto-Rua, *supra* note 9, at 677. I call these generally praiseworthy things, values, and conditions "virtues" for lack of a more generic description.

[19]*See, e.g.*, HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS, AND ETHICS ch. 7 (Boston: Kluwer Academic Publishers, 1989), and THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY 180-86 (Boston, Kluwer Academic Publishers, 1993); and N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, REASON PAPERS No. 17 (Fall 1992), p. 61. For a detailed review of Hoppe's *Economics and Ethics*, see N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 ST. MARY'S L. J. 1419 (1994).

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liberalism, private property, freedom of contract, individualism, natural law, and justice, are really only secondary derivations of the basic individual rights to person and property. Natural law is nothing more than the objective truth that each individual has certain rights — i.e., to own himself and to homestead unowned property. Justice is nothing more than giving a person his due, but what a person's "due" is depends upon what his rights are. Individualism has meaning and validity, because it is *individuals* that have rights. Economic liberalism, private property, and freedom of contract are only the playing out of the fact that individuals have a right to own, and thus trade, private property, and indeed have a right to do *anything* that is not coercive. Economic liberalism is only a consequence of the government's lack of authority to hamper free trade and association between individuals.[20]

Any system of law must be compatible with the rights that individual humans have, and, to that extent, law should be "certain" — that is, we should be certain that law will protect our rights and will not infringe them. The more general goal of "certainty" in the law is merely an aspect of the *rule of law*, which is necessary for any civilization to survive. Without certainty and the rule of law, individuals are not able to predict the results of their actions, and are thus unable to rationally plan for the future.

In Part III, below, I argue that centralized legal systems like the civil law are antithetical to the values of justice, natural law, individual rights, and certainty. Civilians generally support these values, yet they also support the idea of the primacy of legislation which will tend to destroy these values. But how can the civil law be the great system of reason and rationalism, how can it support economic liberalism and individualism, if the civil law is based on

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[20]Almost all of the virtues acclaimed by civilians — as understood here as necessarily compatible with and supportive of individual rights — are genuine, objectively valid virtues or standards that the civil law must be judged by. However, the concept of "democracy" is not in the same class as the other alleged virtues of the civil law. Although the term "democracy" is widely misused today to represent things such as self-determination, economic liberties, or civil liberties, it actually denotes a type of polity whereby certain rules are made by majority vote. Under democracy, nothing prevents a majority from voting for whatever sort of tyrant or tyrannical laws that they like. There is no guarantee, or even likelihood, that laws enacted by a majority or their elected representatives will tend to be just — in fact, it is unlikely, as argued below. *See* Part III.C.3, *infra*.

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legislation, which undercuts these things? Although worshipers of legislation claim to be rationalists, only a naive sort of rationalism, the same naivety that is behind the desire of socialists to "scientifically" plan market activity, can underlie such claims.[21]

Civilians are correct that reason and even rationalism justify the tenets of individualism, individual rights, economic liberalism, private property, and natural law. Contrary to claims of civilians, however, it is a completely private, decentralized law-finding system that is compatible with and that fosters such virtues and principles. Therefore, as will be shown, it is non-legislative, decentralized law-finding systems that are imbued with the spirit of reason and true rationalism. Legislated systems are not compatible with either libertarianism or rationalism.

III. Law, Legislation, and Liberty

In this section I explain the various reasons why legislation is incompatible with individual rights and the related standards that any valid legal order must uphold. Each criticism of legislation applies equally to the civil law, because the civil law is a centralized (i.e., legislative) law-making system, and also applies to modern common law systems to the extent that legislation has supplanted case law as the primary source of law.

A. Anarcho-Capitalism

In the opinion of a minority of libertarians, a principled and consistent application of libertarian principles invalidates not only most of today's (legislated) laws, but also government itself, since government is a coercive institution. Government, by its bare existence, rests on coercion and necessarily initiates violence against innocent individuals (e.g., taxation). Government cannot exist without coercion, and if coercion is illegitimate, then so is government.[22]

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[21]*See* Part IV, *infra*.

[22]Regarding the possibility of a system of anarchy that is ordered, not chaotic, see BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (San Francisco, Ca.: Pacific Research Institute for Public Policy, 1990); DAVID FRIEDMAN, THE MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM (La Salle, Ill.: Open Court, 2d ed. 1989); MORRIS AND LINDA TANNEHILL, THE MARKET FOR LIBERTY (New York: Laissez Faire Books,

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As most libertarians are aware, this view is known as "anarcho-capitalism," since this form of anarchism follows from a respect for individual rights that are also a feature of laissez faire capitalism. It almost goes without saying that, if government may not exist, neither may legislation, because only a governmental legislature can enact statutes. There is simply no room for government and legislation in the moral universe. This does not mean, however, that there would be no law if there were no government. Certainly law can develop in a decentralized court system, whether a government-based common-law system or a private system. As Rothbard explains,

> it is perfectly possible, in theory and historically, [23] to have efficient and courteous police, competent and learned judges, and a body of systematic and socially accepted law — and none of these things being furnished by a coercive government.[24]

The remainder of this Part is devoted to additional critiques of legislation that do not depend on anarcho-capitalism, but only on the general rights and principles accepted by libertarians.

B. Certainty

1. Certainty, the Rule of Law, and Legislation

Certainty, which includes clarity and stability in the law, is a necessary feature of any just legal order, as it is a crucial component of the rule of law itself. "The rule of law" is a phrase that is used with varying meanings: "(1) the absence of arbitrary power on the

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Reprint ed. 1984); MURRAY N. ROTHBARD, FOR A NEW LIBERTY (New York: Libertarian Review Foundation, reprint ed. 1985) esp. ch. 12; GEORGE H. SMITH, *Justice Entrepreneurship in a Free Market, in* ATHEISM, AYN RAND, AND OTHER HERESIES (Buffalo, N.Y.: Prometheus Books, 1991); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 REV. AUSTRIAN ECON. 88 (1990); and Terry Anderson & P.J. Hill, *An American Experiment in Anarcho-Capitalism: The Not So Wild, Wild West*, 3 J. LIBERTARIAN STUD. 9 (1979).

[23] *See* Rothbard, *supra* note 22, at 231-33, discussing the largely successful, anarchic system that lasted for roughly 1000 years in ancient Celtic Ireland. *See also* Benson, *supra* note 22, discussing historical examples and theoretical bases for privately-produced justice.

[24] Rothbard, *supra* note 22, at 234.

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part of the government to punish citizens or to commit acts against life or property; (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm and to the jurisdiction of the ordinary tribunals; and (3) a predominance of the legal spirit in English institutions ...."[25] The rule of law is necessary because a government with arbitrary power to inflict violence on its subjects is a standing threat to individual liberty. And if laws are not equally applicable to all men and women, some individual rights will not be respected, because all men and women have certain inalienable, natural rights by their very nature as humans. Clearly, then, the rule of law must be maintained by any just legal system. But the rule of law "cannot be maintained without actually securing the certainty of the law, conceived of as the possibility of long-run planning on the part of individuals in regard to their behavior in private life and business."[26] Thus, a direct implication of rationalism is that the law should be certain.

Even those favoring legislation recognize the importance of certainty; indeed, certainty is one of the purported hallmarks of the civil law. In the words of Professor Vernon Palmer,

> What enduring objectives underlie the relentless drive toward codification in the twentieth century? In my view, this may be explained in three words — certainty, justice, and modernity. ... An unchanging purpose of codification and recodification is to overcome an existing fragmentation of law and legal sources in order to create the conditions necessary for *legal certainty*.[27]

Yet, as Leoni points out, there is much more certainty in a decentralized legal system, than in a centralized legislative system.

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[25]Leoni, *supra* note 2, at 61.

[26]*Id.* at 95.

[27]Vernon Palmer, *Celebrating the Québec Codification Achievement: A Louisiana Perspective*, 38 LOY. L. REV. 311, 315 (1992) (emphasis added). *See also* Shael Herman & David Hoskins, *Perspectives on Code Structure: Historical Experience, Modern Formats, and Policy Considerations*, 54 TUL. L. REV. 987, 1001-02 (1980); Herman, *supra* note 5, at 11; Shael Herman, *Minor Risks and Major Rewards: Civilian Codification in North America on the Eve of the Twenty-First Century*, 8 TUL. CIV. L. FORUM 63, 65 (1993) ("Civilians presuppose as a fundamental tenet that the fountainhead of stability is their legislation."); and Leoni, *supra* note 2, at 73, 142-43 (a desire for certainty in the law, in the sense of verbal precision, was one of the chief reasons for the continental codification efforts).

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When the legislature has the ability to change the law from day to day, we can never be sure what rules will apply tomorrow. In one of Leoni's most brilliant insights, he points out that, in a system of legislative supremacy,

> nobody can tell whether a rule may be only one year or one month or one day old when it will be abrogated by a new rule. All these rules are precisely worded in written formulae that readers or interpreters cannot change at their will. Nevertheless, all of them may go as soon and as abruptly as they came. The result is that, if we leave out of the picture the ambiguities of the text, we are always "certain" as far as the literal content of each rule is concerned at any given moment, but we are *never certain* that tomorrow we shall still have the rules we have today.[28]

Thus, a

> legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day. As a result, people are prevented not only from freely deciding what to do, but from foreseeing the legal effects of their daily behavior.[29]

We may have, then, either rule by legislators, or the rule of law, but not both.[30] In the words of the Italian scholar Giovanni Sartori, "Mass fabrication of laws ends by jeopardizing the other fundamental requisite of law — certainty."[31]

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[28]Leoni, *supra* note 2, at 75.

[29]*Id.* at 10.

[30]GIOVANNI SARTORI, LIBERTY AND LAW 15 (Menlo Park, Ca.: Institute for Humane Studies, 1976). The "other" fundamental requisite of law is that law be based on rules of general application, a requisite that special statutes tend to undermine. *Id.* I am grateful to Leonard Liggio for calling Sartori's works to my attention.

[31]*Id.* at 38. *See also* Ridgway K. Foley, Jr., *Invasive Government and the Destruction of Certainty*, THE FREEMAN (Jan. 1988) p. 11; Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J. LAW & PUBL. POL'Y 661, 672-73, 681-82 (1988); Leonard P. Liggio & Tom G. Palmer, *Freedom and the Law: A Comment on Professor Aranson's Article*, 11 HARV. J. LAW & PUBL. POL'Y 713 (1988).

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2. *Decentralized Law-Finding Systems*

a. Limits of Courts' Decisions: Jurisdiction, Scope of Decision, and Precedent

By contrast, judicial decisions — whether by private arbitrators in an anarcho-capitalist society or by judges in a government-established common-law system — are much less able to reduce legal certainty than is legislation. This is because, as Leoni explains, the position of common-law or decentralized judges "is fundamentally different from that of legislators, at least in three very important respects."[32] First, judges can only make decisions when asked to do so by the parties concerned. Second, the judge's decision is less far-reaching than legislation because it primarily affects the parties to the dispute, and only occasionally affects third parties or others with no connection to the parties involved.[33]

Regarding this second point, however, let me point out that this is true only for the plaintiff, however, in systems where a verdict may be enforced against a defendant regardless of his consent to the court's jurisdiction — i.e., where courts have compulsory jurisdiction over certain individuals. But even this power is of a drastically lesser scope than the ability of legislators to enact statutes at any time, without being requested by anyone, and that affect everyone, not just plaintiffs and defendants. Further, in a totally

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[32]Leoni, *supra* note 2, at 22. *See also* Aranson, *supra* note 31, at 669-671 and Rothbard, *For A New Liberty*, *supra* note 22, at 229 (discussing Leoni's views with respect to these issues).

[33]As Professor Benson summarizes, without legislative interference by non-judges, the

> common law would grow gradually. It would grow and develop in the same way that all customary law grows and develops, particularly as a consequence of the mutual consent of parties entering into reciprocal arrangements. For example, two parties may enter into a contract, but something then occurs that the contract did not clearly account for. The parties *agree* to call upon an arbitrator or mediator to help lead them to a solution. The solution affects only those parties in the dispute, but if it turns out to be effective and the same potential conflict arises again, it may be *voluntarily* adopted by others. In this way, the solution becomes part of customary law.

Benson, *supra* note 22, at 283 (endnote omitted).

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private court system, courts do not necessarily have to have the ability to assert jurisdiction over unwilling defendants.[34] And even in a government court system such as the common law, it is not absolutely necessary that the courts have compulsory jurisdiction over unwilling participants. By contrast, legislation of necessity arrogates to itself jurisdiction over all the government's subjects.

Third, a judge's discretion is further limited by the necessity of referring to similar precedents.[35] This does not necessarily mean that a judge is automatically bound by a prior judicial decision on similar facts, but that at least such precedents are influential. When law is viewed as being *found* rather than *made*, it makes sense that one court would refer to principles already discovered and developed over the centuries by other judges. Because individuals crave certainty and predictability they will tend to prefer decisions of courts that respect the wisdom of established custom and precedent, where possible. Thus, even a government court will feel a necessity to refer to similar precedents, so that its judgments and reasoning will be respected. A private court will have even more incentive to respect relevant precedents so as to gain and retain customers.

But a court's essential job is to issue a just decision rather than automatically following precedents through blind obedience. Indeed, under the Roman law, and under the common law as it existed at the time of Blackstone, an individual decision was not absolutely binding on future courts.[36] Even the great common-law advocate "Blackstone was not a slavish adherent of the principle of *stare decisis* (decision according to precedent) — a prior decision could be overruled if 'contrary to reason' ...."[37] But Blackstone did favor *stare decisis* as a means of subordinating judges to law, and for stability in the law:

> For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep

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[34]*See* Benson, *supra* note 22, at 33 *et passim*; Tannehills, *supra* note 22, at 66 *et seq*; Bruce L. Benson, *Customary Law as a Social Contract: International Commercial Law* 3 CONST. POLITICAL ECON. 1, 9 (1992).

[35]*See* Benson, *supra* note 22, at 17 and 364.

[36]Gordon Tullock, *Courts as Legislators*, *in* LIBERTY AND THE RULE OF LAW (College Station, Texas: Texas A&M University Press, Robert L. Cunningham ed. 1979), Ch. 5, p. 132 at 142.

[37]Richard A. Posner, *Blackstone and Bentham*, 19 J. LAW & ECON. 569, 584 (1976) (citing 1 William Blackstone, Commentaries on the Laws of England §83, at *70).

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> the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments ...[38]

In this sense the civilian concept of *jurisprudence constante* is more likely to be adhered to by courts than *stare decisis*. (*Stare decisis* contemplates adherence by a court to a principle of law announced and applied in a single occasion in the past. Under the doctrine of *jurisprudence constante*, the rule of law upon which repeated decisions in a long line of cases is based is entitled to great weight in subsequent decisions.[39]) In any event, it is very likely that judges will always attempt to distinguish or at least criticize similar precedents even if they choose not to follow them.[40] As mentioned above, this will tend to limit the judge's discretion to "make" law.

b. Government Courts: Extra-Market Powers and Disguised Legislation

Thus, decentralized law-finding systems offer more certainty than centralized law-making systems. As the discussion above shows, however, in a government-backed *common-law* type of decentralized system (as opposed to a wholly private court system), the common law itself can develop legislative characteristics that tend to undermine uncertainty just as legislation does. This is because common-law courts are government courts, and thus have extra-market powers, such as the power to subpoena, the power of compulsory jurisdiction over defendants, and the power of judicial review.

Supreme courts, for example, may engage in what is really disguised legislation. The United States Supreme Court does this all the time.[41] However, this is not a problem of decentralized law

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[38] 1 Blackstone, *supra* note 146 §83, at *69, also quoted in Posner, *supra* note 37, at 582.

[39] *See Johnson v. St. Paul Mercury Ins. Co.*, 236 So.2d 216, 218 (La. 1970).

[40] *See* Rothbard, *For a New Liberty*, *supra* note 22, at 228.

[41] *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (New York: The Free Press, 1990); HENRY MARK

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itself, but of involving government in the court system. Under anarcho-capitalism, with a system of totally private courts and judges, these problems would be minimized as much as is possible in the real world. And, as Leoni points out,

> even supreme courts are not at all in the same practical position as legislators. After all, not only the inferior courts, but also the supreme courts, may issue decisions only if asked to do so by the parties concerned; and although supreme courts are in this respect in a different position from inferior courts, they are still bound to "interpret" the law instead of promulgating it. ... [Further,] under a system of "binding" precedent, supreme courts too may be bound ... by their own precedents . .. [T]his makes for a considerable difference between judges of supreme courts and legislators as far as the unwelcome imposition of their respective wills on a possibly great number of other dissenting people is concerned.[42]

Thus, even under a government-based decentralized legal system such as the common law, judges' ability to "legislate" is radically different from that of legislators. The possibility of judges acting like legislators is not necessarily implied in the nature of decentralized law-finding systems, but "is rather a deviation from it and a somewhat contradictory introduction of the legislative process under the deceptive label of lawyers' or judiciary law at its highest stage."[43]

* * *

Although law developed in a decentralized legal order is an "unplanned," spontaneous order, it results in certainty, while a centralized legal system tends to destroy certainty. In a decentralized legal system,

> [l]aw develops in a case by case manner during which judges fit and adapt existing law to circumstances so as to produce an overall order which, although it may not be 'efficient' in a

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HOLZER, SWEET LAND OF LIBERTY: THE SUPREME COURT AND INDIVIDUAL RIGHTS (Costa Mesa, Calif.: Common Sense Press, 1983); BERNARD H. SIEGEN, ECONOMIC LIBERTIES AND THE CONSTITUTION (Chicago: University of Chicago Press, 1980); and James A. Dorn & Henry G. Manne, eds., ECONOMIC LIBERTIES AND THE JUDICIARY (Fairfax, Va.: George Mason University Press, 1987).

[42]Leoni, *supra* note 2, at 181.

[43]*Id.* at 24.

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> technical, rationalistic sense, ... is more stable than that created by statute .... [S]tatute law is in fact much more capricious [than common law] precisely because, in the modern world especially, statutes change frequently according to the whims of legislatures .... *A structure of law which is not the result of will and cannot be known in its entirety, paradoxically, displays more regularities than a written code.*[44]

3. *Civil Codes*

a. The "Special" Status of a Civil Code

Can legislation be made more stable so that it does not engender uncertainty? Written constitutions such as the United States Constitution are, after all, difficult to explicitly amend,[45] although the Supreme Court has amended the Constitution *de facto* hundreds of times.[46] The more stable a written statute is, however, the less it resembles legislation, and vice-versa. Civilians contend that the civil law's core is the civil code, which is not meant to change on a daily basis. Rather, a code is more like a constitution, which changes only rarely, in response to greater urgency. The code is not a normal sort of legislation, it is more stable than legislation, and therefore is not subject to the criticism that it engenders uncertainty in the same way as does a mere legislative system.

> [C]codification has for its object the creation of a permanent framework and direction of the evolution of the law. It has a prospective life, and it is not limited to a short-lived or cyclical legislation. ... [C]odification is to be contrasted with simple legislation tailored to the circumstances.[47]

A civil code is more like a constitution than mere legislation:

> It is a commonplace that a civil code enjoys a more exalted status than an ordinary statute. The higher dignity accorded to a code is traditional in the civil law world. This respect is due originally to the special qualities of the legislation — its

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[44]Barry, *The Tradition of Spontaneous Order*, 5 LIT. OF LIBERTY 7, 44 (1982) (emphasis added), quoted in Aranson, *supra* note 31, at 723, n.40.

[45]In over 200 years, the U.S. Constitution has been amended only 27 times.

[46]*See supra* note 41 and references cited therein.

[47]Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 LA. L. REV. 1073, 1079 (1988).

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> relative permanence, imposing structure, and inner coherence. Statutes may be ad hoc, scattered, and temporary, but the civil code in our tradition has attained something close to the stature enjoyed by a constitution or a Magna Carta in the common-law world.[48]

However, such flattery cannot change the fact that the civil code itself provides that legislation is the primary source of law. It does not provide that *codal* legislation, which conforms to certain code-like requirements (e.g., generality, natural law, and the like), is the only source of law. It does not abolish mere statutes and does not take precedence over any subsequently-enacted conflicting statutes, as the U.S. Constitution does; and neither does it provide for a supermajority requirement for its amendment. From a legislator's point of view, the civil code and more mundane legislation are on the exact same horizontal level.

Thus the code itself is subject to continual revision and, indeed, is continually revised. It may not in practice be revised as drastically or as often as the other statutes, but the legislature retains the ability to change the code from day to day. For, "a code is a special kind of statute, but a statute nevertheless."[49]

b. Diluting Effect of Special Statutes

What is worse, even if the civil code itself were to be immutably etched in stone — and civil codes are, admittedly, amended much less frequently in some regimes than are "normal" statutes — it would tend to be swamped by subsequent special statutes. Civilians do not disagree with this point. Once a code has been produced and the laws codified, as Professor Palmer recognizes,

> [f]ragmentation continues inexorably. Special legislation lying outside of the code piles up on all sides, as caselaw and jurisprudence create a thicker and thicker gloss upon the code texts. ... [T]his inflation of redundant and overlapping laws ... is the true enemy of a scientific codification and *the true nemesis of legal certainty*.[50]

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[48]Vernon Palmer, *The Death of a Code — The Birth of a Digest*, 63 TUL. L. REV. 221, 235 (1988).

[49]Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147, 158 (1989).

[50]Palmer, *supra* note 27, at 316 (emphasis added). *See also id.* at 317 (discussing the phenomenal growth of special laws in Louisiana since 1825);

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The inexorable production of specialized legislation thus dilutes any stabilizing effect of a civil code, and makes the code less relevant. Given the unwieldy hodge-podge of arcane, special-interest statutes that we are faced with today, is it any wonder that uncertainty — both in what the law is today, and in what it might be tomorrow — is engendered? Yet we would not have reached such a chaotic state if not for the legislature's ability to enact its will into law.

4. Negative Effects of Uncertainty

a. Sanctity of Contract

As discussed above,[51] without certainty of the law individuals are less able to make long-range plans. The uncertainty resulting from legislative supremacy also has the negative side effect of weakening the sanctity of contract. Legislation

> destroy[s] established rules and [nullifies] existing conventions and agreements that have hitherto been voluntarily accepted and kept. Even more disruptive is the fact that the very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements.[52]

When legislation becomes supreme and statutes are fruitful and multiply, our very conception of what the law is changes. Unlike in the past, "we are used to having our rights modified by the sovereign decisions of legislators. A landlord no longer feels surprised at being compelled to keep a tenant; an employer is no less used to having to raise the wages of his employees in virtue of the decrees of Power. Nowadays it is understood that our subjective rights are precarious and at the good pleasure of authority."[53]

When contractual reliance becomes more risky, "contractual exchanges requiring temporally separated future performance

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Leoni, *supra* note 2, at 6 (discussing the submersion of continental civil codes in thousands of specialized statutes).

[51]*See supra* note 26 and accompanying text.

[52]Leoni, *supra* note 2, at 18.

[53]BERTRAND DE JOUVENEL, SOVEREIGNTY: AN INQUIRY INTO THE POLITICAL GOOD 189 (Chicago: University of Chicago Press, 1957). *See also* Leoni, *supra* note 2, at 145-46.

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become less attractive, leading the parties to develop costly alternatives, such as contractual hostages (if that is possible at all under the statute), otherwise unwarranted vertical integration of production processes, or the foregoing of such exchanges entirely."[54] Such alternatives impoverish us all by imposing unnecessary costs on production and exchange.

b. Time Preference and the Structure of Production

Another extremely pernicious but subtle effect of the increased uncertainty of legislative systems is the increase of man's time preference. Individuals invariably demonstrate a preference for earlier goods over later goods, all things being equal. This is the phenomenon of time preference.[55] Time preference explains the advent of interest payments, payments made to someone who loans money. When a loan of money is made, the lender gives up (more-valued) present dollars and receives (less-valued) future dollars, and thus the loan will go forward only if the lender is compensated with interest.

Men prosper materially when time preferences are lower, since when this is the case, they are more willing to forego immediate benefits such as consumption and invest their time and capital in more indirect (i.e., more roundabout, lengthier) production processes, which yield more and/or better goods for consumption or for further production.[56] We forego picking bananas to eat them now (consumption) and devote some of our present time to the building of fishing nets (capital), to catch more fish in the future which can feed more people for the same amount of work as it took to search for bananas.

Any artificial raising of the general time preference rate tends to impoverish society by pushing us away from production, long-term investments and roundabout production processes, and towards

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[54]Aranson, *supra* note 31, at 681-82 (footnote omitted).

[55]Hans-Hermann Hoppe, *Time Preference, Government, and the Process of De-Civilization—From Monarchy to Democracy*, 5 J. DES ECONOMISTES ET DES ETUDES HUMAINES 319, 319-21 (1994). *See also* LUDWIG VON MISES, HUMAN ACTION: A TREATISE ON ECONOMICS chapters XVIII, XIX (Chicago: Contemporary Books, Inc., 3d rev'd ed., 1966); MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE: A TREATISE ON ECONOMIC PRINCIPLES (Los Angeles: Nash Publishing, 1962) (2 vols.).

[56]Hoppe, *supra* note 55, at 320-21.

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consumption and more short-term investments which produce fewer and/or worse quality goods. In other words, instead of foregoing picking bananas to eat them now and instead of spending time building fishing nets to produce goods in the future, we tend to eat more bananas now and live only for the moment, and reduce our investment in the future. Clearly, when the general time preference rate is artificially raised, the populace becomes materially poorer and worse off.

Yet increased uncertainty causes an increase in time preference rates. With the very possibility of legislation, the future is made more unpredictable than it would be without the possibility of legislation. Future goods are always less desirable to individuals than present goods. But if the future becomes more unpredictable, future actions and goods become less certain to occur, and thus future goods become relatively even *less* desirable, and present goods therefore become relatively more desirable. As explained by Hoppe,

> [T]he mere fact of legislation — of democratic law-making — increases the degree of uncertainty. Rather than being immutable and hence predictable, law becomes increasingly flexible and unpredictable. What is right and wrong today may not be so tomorrow. The future is thus rendered more haphazard. Consequently, all around time preferences degrees will rise, consumption and short-term orientation will be stimulated, and at the same time the respect for all laws will be systematically undermined and crime promoted (for if there is no immutable standard of 'right', then there is also no firm definition of 'crime').[57]

Leoni anticipated a similar effect of legislation. Leoni called the illusory certainty generated by written legislation the short-run certainty of the law, as opposed to genuine, long-run legal certainty. The desire for short-run certainty over long-run certainty corresponds to an immature desire for immediate gratification. Leoni writes:

> I am reminded of a conversation I had with an old man who grew plants in my country. I asked him to sell me a big tree for my private garden. He replied, "Everybody now wants big trees. People want them immediately; they do not bother about the fact that trees grow slowly and that it takes a great

[57] *Id.* at 340.

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> deal of time and trouble to grow them. Everybody today is always in a hurry," he sadly concluded, "and I do not know why."[58]

The answer is, in part, because an increased climate of uncertainty increases the general time preference rate.

c. Time Preference and Crime

There is also a fascinating relationship, as Hoppe above alludes to, between higher time preference and increased crime. This is because earning a market income requires more patience than does the immediate gratification that criminals seek: "one must first work for a while before one gets paid. In contrast, specific criminal activities such as murder, assault, rape, robbery, theft, and burglary require no such discipline: the reward for the aggressor is tangible and immediate whereas the sacrifice — possible punishment — lies in the future and is uncertain."[59] As a person becomes more present-oriented, immediate (criminal) gratifications become relatively more attractive, and future, uncertain punishment becomes less of a disincentive. Thus many people on the margin — those who are just deterred from committing crimes by the threat of possible future punishment under normal time-preference conditions in a free society — will not be deterred from committing crimes in a society with legislation and its concomitant increase in time preference. In other words, there are individuals today who are committing violent crimes solely because of the increased uncertainty in society caused by the existence of legislation.[60]

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[58]Leoni, *supra* note 2, at 80.

[59]Hoppe, *supra* note 55, at 340 n.31. On the relationship between time preference and crime Hoppe cites J.Q. WILSON & R.J. HERRNSTEIN, CRIME AND HUMAN NATURE 49-56, 416-22 (1985); E.C. BANFIELD, THE UNHEAVENLY CITY REVISITED (Boston: Little, Brown, 1974); and *idem*, *Present-Orientedness and Crime*, in RANDY E. BARNETT & J. HAGEL, EDS., ASSESSING THE CRIMINAL, RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS (Cambridge: Ballinger, 1977).

[60]Regarding "the increase in criminal activity brought about by the operation of democratic republicanism in the course of the last hundred years as a consequence of steadily increased legislation and an ever expanding range of 'social,' as opposed to private, responsibilities," *id.* n.31, Hoppe cites R.D. MCGRATH, GUNFIGHTERS, HIGHWAYMEN, AND VIGILANTES: VIOLENCE ON THE FRONTIER (Berkely: University of California Press, 1984), esp. chapter 13, and

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Further, when the increased uncertainty tends to impoverish us by shortening the structure of production, more people are poor and impoverished, which also tends to increase the amount of crime in society.

When law is based on legislation, uncertainty is increased, not decreased, even in the supposedly "certain" civil law systems. This hampers the ability of individuals to engage in private calculation, i.e. in planning for the future and in knowing the legal consequences of their future actions. It makes contractual reliance more risky and thus imposes further costs on otherwise-beneficial economic transactions. And the unavoidable uncertainty caused by legislation also raises our time preference rate, which "necessarily exerts a push away from more highly capitalized, and hence more productive production processes, and into the direction of a hand-to-mouth existence,"[61] and thus tends to impoverish us all.

C. Central Planning and Economic Calculation

Besides the fact that the possibility of legislation breeds uncertainty and is thus harmful for this reason alone, legislators face a problem that central economic planners also face. It is an information problem, and this unavoidable problem makes it unlikely that any body of legislation will develop substantively legitimate law — i.e., a body of law consistent with principles such as justice, individualism, and economic liberalism. For the same reason that central economic planning is impossible, centrally-planned laws cannot hope to be truly based on the true interests or needs or situation of the populace. I first discuss the reason why central planning — i.e., socialism — is impossible, before analogizing socialism to legislation.

1. Central Planning and the Impossibility of Socialism

With the collapse of socialism, mainstream opinion is finally starting to realize that socialism, in addition to being incredibly immoral and wasteful of human life, simply does not work. But this comes as no revelation and no surprise to the Austrian school of

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idem, *Treat Them To a Good Dose of Lead*, CHRONICLES, January 1994, pp. 17-18.

[61] Hans-Hermann Hoppe, "The Economics and Sociology of Taxation," in Hoppe, *Economics and Ethics*, *supra* note 19, at 34.

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economics following in the footsteps of Ludwig von Mises. As far back as 1920, Mises explained why socialism is *impossible*. Although Mises's amazingly prescient ideas were arrogantly and unfortunately ignored for decades by establishment thinkers, Mises has finally been vindicated by the universally (if belatedly) acknowledged failure of socialism,[62] and I will not re-argue the obvious here, especially in a libertarian journal.

However, Mises's explanation of why socialist central planning is doomed to failure has, as pointed out by Leoni, important ramifications for *legislation* as well. Thus, in this subsection I briefly discuss the so-called "economic calculation debate" before exploring its implications for legislation.

In 1920 Mises published his devastating critique of socialism, "Economic Calculation in the Socialist Commonwealth."[63] Mises showed that, besides the incentive problem of socialism (e.g., "Who will take out the garbage?")[64] the central planner cannot know what products or how much of them to order to be produced, without the information provided by prices on a free market. In a free market, in which there is by definition private ownership of property, the free exchange of goods by individual human actors in accordance with their subjective utilities establishes relative prices, in terms of money (which historically was gold and other precious metals). These money prices are the indispensable tool of calculation for rational coordination of scarce resources, since "monetary economic calculation is the intellectual basis of the market economy."[65] Without market prices, how can a central planning board know what or how many products to produce, with which techniques and raw

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[62]*See* Gertrude E. Schroeder, *The Dismal Fate of Soviet-Type Economies: Mises Was Right*, CATO J. v.11 n.1 (Spring/Summer 1991) p. 13; Mark Skousen, *"Just because socialism has lost does not mean that capitalism has won": Interview of Robert L. Heilbroner,* FORBES, May 27, 1991, p. 130.

[63]LUDWIG VON MISES, ECONOMIC CALCULATION IN THE SOCIALIST COMMONWEALTH (Auburn, Alabama: Ludwig von Mises Institute, 1990) (1920); LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS 95-130 (Indianapolis: Liberty Fund 3d rev'd ed., trans. J. Kahane, 1981); Mises, *Human Action*, *supra* note 55, at 200-31, 695-715; Murray N. Rothbard, *The End of Socialism and the Calculation Debate Revisited*, 5 REV. AUSTRIAN ECON. 51 (1991) [hereinafter, Rothbard, *The End of Socialism*].

[64]Rothbard, *The End of Socialism*, *supra* note 65, at 51.

[65]Mises, *Human Action, supra* note 55, at 259.

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materials, and in which location? These and a practically infinite number of questions are simply unanswerable without the information provided by monetary prices. As Rothbard concisely explains:

> Mises demonstrated that, in any economy more complex than the Crusoe or primitive family level, the socialist planning board would simply not know what to do, or how to answer any of these vital questions. Developing the momentous concept of *calculation*, Mises pointed out that the planning board could not answer these questions because socialism would lack the indispensable tool that private entrepreneurs use to appraise and calculate: the existence of a market in the means of production, a market that brings about money prices based on genuine profit-seeking exchanges by private owners of these means of production. Since the very essence of socialism is collective ownership of the means of production, the planning board would not be able to plan, or to make any sort of rational economic decisions. Its decisions would necessarily be completely arbitrary and chaotic, and therefore the existence of a socialist planned economy is literally "impossible" (to use a term long ridiculed by Mises's critics).[66]

Defenders of socialism often countered with the bare fact of the Soviet Union's existence and "success" as disproof of the contention that socialism is impossible. However, as Rothbard points out, Soviet GNP and other production figures relied upon as evidence of the USSR's success were wholly inaccurate and deceitful — as the final collapse of socialism has made manifest. Further, the Soviet Union and other socialist countries have never enjoyed complete socialism, for despite their best efforts to stamp out individual initiative, free trade, and private property, the existence of black (i.e., free) markets and bribery is widespread, which prevent socialism from completely controlling and thus strangling the economy.

Also, these socialist economies existed in a world containing many (relatively) capitalist markets, such as that in the United States. Thus, the socialist planners were able to parasitically copy the prices of the West as a crude guideline for pricing and allocating

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[66]Rothbard, *The End of Socialism*, *supra* note 65, at 52-53.

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their own capital resources.[67] To the extent true socialism was able to be imposed on the populace, economic calculation thereunder was impossible and the people suffered accordingly.

In the words of Mises, "Where there is no market there is no price system, and where there is no price system there can be no economic calculation."[68] "The paradox of 'planning' is that it cannot plan, because of the absence of economic calculation. What is called a planned economy is no economy at all."[69]

2. *Legislation as Central Planning*

One of Bruno Leoni's greatest achievements was to teach us that Mises's criticism applies not only to a central planning board of a socialist economy, but also to a legislature attempting to "centrally plan" the laws of a society. Leoni notes that several economists in the early '20s, but especially Mises, demonstrated "that a centralized economy run by a committee of directors suppressing market prices and proceeding without them does not work because the directors cannot know, without the continuous revelation of the market, what the demand or the supply would be ..."[70] Leoni recognized that

> this demonstration may be deemed the most important and lasting contribution made by the economists to the cause of individual freedom in our time. *However, its conclusions may be considered only as a special case of a more general realization that no legislator would be able to establish by himself, without some kind of continuous collaboration on the part of all the people concerned, the rules governing the actual behavior of everybody in the endless relationships that each has with everybody else.* No public opinion polls, no referenda, no consultations would really put the legislators in a position to determine these rules, any more than a similar procedure could put the directors of a planned economy in a

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[67] *Id.* at 73-74. *See also* Mises, *Human Action*, *supra* note 55, at 702 (discussing the use of western price systems by socialist governments).

[68] Mises, *Socialism*, *supra* note 63, at 113 (p. 131 of the 1936 J. Kahane translation).

[69] Mises, *Human Action*, *supra* note 55, at 700.

[70] Leoni, *supra* note 2, at 19.

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> position to discover the total demand and supply of all commodities and services.[71]

What does this mean? Leoni is pointing out that legislators, even if they wanted to enact rules that truly take into account the actual situation, customs, expectations, and practices of individuals, simply can never collect enough information about the near-infinite variety of human interactions. The legislator, like a communist central planner, can only grope in the dark. And unlike a blind man who literally has to grope in the dark but at least knows when he has finally run into a wall or found the door, the legislator (or central planner) have no reliable guide for knowing whether they have constructed the "right" law (or economic allocation) or not. Further, not only can legislators not know the actual situation of the individuals they intend to cast their legislative net over, but they cannot predict the often far-reaching effects of legislation. Legislation routinely has unintended consequences, a fact that cannot be gotten around since it is necessitated by the systematic ignorance that legislators face.[72]

The ultimate reason that the legislator and central planner are both ultimately doomed to failure is that *"there is more than an analogy between the market economy and a judiciary or lawyers' law, just as there is much more than an analogy between a planned economy and legislation."*[73] There is "more" than an analogy because legislation and central planning are really the same thing: coercively-backed commands emanating from the government that order individuals to act in certain ways that the government prefers.

In a common-law process, law develops spontaneously, much as prices arise spontaneously on a free market. Mises showed that only when individuals remain free to trade and own private property can genuine prices be discovered. Similarly, true law is discovered in a process that "can be described as sort of a vast, continuous, and chiefly spontaneous collaboration between the judges and the judged in order to discover what the people's will is in a series of definite instances — a collaboration that in many respects may be compared

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[71]*Id.* at 19-20 (emphasis in original). *See also id.* at 89; Aranson, *supra* note 31, at 676.

[72]On the unintended consequences that flow from various governmental programs and laws, see WILLIAM C. MITCHELL AND RANDY T. SIMMONS, BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY (Boulder: Westview Press, 1994).

[73]Leoni, *supra* note 2, at 23 (emphasis in original).

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to that existing among all the participants in a free market."[74] True Law cannot be designed or imposed top-down on society. The form of a legal system, like a price structure or like a language, must evolve naturally, from the bottom up. This is why the artificial language Esperanto failed to take hold.[75] The naive belief that Law can be discovered by means of government employees' dictates is reminiscent of the joke about the new English public school, in which the headmaster announced to the students one day, "from now on, it will be a tradition at the School to wear hats on Fridays." Legislation is artificial law, and is no substitute for evolved law.

A crucial reason for the systematic ignorance of central planners and legislators alike is "the decentralized, fragmentary character of knowledge."[76] This makes central planners and central law-makers systematically unable to ever have enough knowledge to make informed decisions that affect entire economic or legal systems. Moreover, not only is a central planner "unable" to gather information only present in a dynamic price structure, but the attempt to plan actually *destroys* the price structure because the private property system at the base of a price structure is outlawed. Similarly, not only does a legislator face a severe ignorance problem — he could never hope to have a comprehensive and continually updated view of all the interactions, rules, relationships, and customs that exist among the people — he also subverts the very spontaneous legal order that would form in the absence of legislative interference. Customs change, for example, because of the uncertainty introduced, because people become more suspicious and rely less on contracts, and because their time preference increases, as discussed above.[77] As Professor Aranson puts it, "Legislation saps the social order of spontaneity."[78]

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[74]*Id.* at 22. *See also id.* at 104; Aranson, *supra* note 31, at 668-69; and note 33, *supra*, and accompanying text.

[75]*See* Leoni, *supra* note 2, at 218 (discussing similarities between evolved systems like language and law).

[76]Aranson, *supra* note 31, at 675.

[77]*See supra* notes 55-61 and accompanying text.

[78]Aranson, *supra* note 31, at 675. *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 404 (New York: Simon & Schuster, Inc., 2d ed. 1985) (discussing James Carter's view that legislated "[c]odes impaired the orderly development of the law; they froze the law into semipermanent form; this prevented natural evolution. ... A statute drafted by a group of so-called experts was bound to be an inferior product, compared to what centuries of

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Just as a decentralized, free market economy is essential to the coordination of resources and the production of wealth, so a decentralized law-finding system is a prerequisite to allowing true Law to develop. This does not guarantee that the law will be just — there are no guarantees — but at least it is possible in a decentralized law-finding system, while in a legislated system it is not.

3. Special Interests and the Unrepresentative Character of Legislation

A problem of a legislative system that is related to the central planning problem is its unrepresentative character. Although democracy is not without problems,[79] a representative democracy is better than one that is not. Because of the information problem faced by centralized law-makers, they cannot know the people's wishes with any accuracy or detail. *"[A] legal system centered on legislation resembles ... a centralized economy in which all the relevant decisions are made by a handful of directors, whose knowledge of the whole situation is fatally limited and whose*

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evolution, of self-correcting growth, could achieve. ... [T]he social and economic legislation of the late 19th century ... were doomed to failure; they were hasty intrusions, and they contradicted the deeper genius of the law."); and Benson, *supra* note 22, at 282 ("public production of law undermines the private property arrangements that support a free market system"). An interesting discussion of, *inter alia*, the debate on whether to legislatively codify the common law is found in Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119 (1994).

For further discussion of Leoni's ideas in this regard and related issues, see Gottfried Dietze, *The Necessity of State Law*, in *Liberty and the Rule of Law*, *supra* note 36 (ch. 3, p. 74); Tullock, *supra* note 36; Sartori, *Liberty and Law*, *supra* note 30, and chapter 13 of *Democratic Theory*, *supra* note 9; Leonard P. Liggio, *Law and Legislation in Hayek's Legal Philosophy*, 23 SOUTHWESTERN U. L. REV. 507 (1994); Murray N. Rothbard, *On Freedom and the Law*, NEW INDIVIDUALIST REVIEW (Winter 1962, vol. 1, no. 4) 37, *reprinted in* NEW INDIVIDUALIST REVIEW at 163 (1982) (reviewing Leoni, *Freedom and the Law*, *supra* note 2).

[79]For a discussion of some problematic tendencies of democracies, see Hoppe, *supra* note 55; and *idem*, *Free Immigration or Forced Integration?* CHRONICLES, July 1995, p. 25.

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respect, if any, for the people's wishes is subject to that limitation."[80]

Professor Sartori puts the point forcefully:

> [W]e make the inference that when a person who allegedly represents some tens of thousands contributes ... to the lawmaking process, then he is making the thousands of people whom he is representing free, because the represented thereby obey norms that they have freely chosen ... How absurd! ... In empirical terms, from the premise that I know how to swim it may follow that I can cross a river, but not that I can cross the ocean.[81]

Similarly, even if citizen involvement and participation in a small community can produce liberty, "we cannot draw the conclusion that the same amount of participation will produce the same result in a large community; for in the latter an equally intense participation will entail diminishing consequences."[82] Leoni argues that "the more numerous the people are whom one tries to 'represent' through the legislative process and the more numerous the matters in which one tries to represent them, the less the word 'representation' has a meaning referable to the actual will of actual people other than that of the persons named as their 'representatives.'"[83]

Legislators cannot discover the will of their constituents, and, as explained above,[84] cannot know very much at all about the actual interactions and circumstances of those who they seek to regulate. At best, then, a legislator will produce rather neutral, if bumbling, intrusive, and ineffectual, laws. But we all know about lobbyists and special interest groups, and their existence ensures that legislators will not be merely ignorant idiots. Instead, they will actively seek to enact invidious statutes that benefit a select few at the expense of others and, in the long run, at the expense of all of society.

In the political process, statutes are enacted that reflect the will of a contingent majority of legislators. This provides an opportunity for various groups to demand special treatment, such as

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[80]Leoni, *supra* note 2, at 22 (emphasis in original). *See also id.* at 89; Aranson, *supra* note 31, at 675.

[81]Sartori, *Liberty and Law*, *supra* note 30, at 31-32.

[82]*Id.* at 32.

[83]Leoni, *supra* note 2, at 19. *See also* Aranson, *supra* note 31, at 676-77.

[84]*See* Part III.C.2, *supra*.

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protectionism or blatant wealth transfers. Those with a vested interest in a given piece of legislation are willing to invest much time, effort, and money (e.g. for bribes) to persuade legislators to enact the legislation. Each individual in the large group outside the special interest group feels the pain of the legislation much less than the special interest group will benefit, so that there is relatively little incentive for many people to oppose the special group's lobbying efforts, or even to educate themselves as to which lobbying efforts are taking place. Escalating efforts at forming special interest groups to lobby for specialized statutes results in "nothing less than a potential *legal war of all against all*, carried on by way of legislation and representation."[85] Any legislative system in a large, modern society is doomed to succumb, to a large extent, to special interest groups rather than representing the general will of the populace.

4. Decentralized Law-Finding Systems

As discussed above, legislative systems such as the civil law are centralized law-making systems, and face many of the problems faced by central planners in general. Decentralized law-finding systems like the common law, on the other hand, are analogous to free markets in that a spontaneous order arises in both.[86] Unlike a legislator imposing his will on society, when a judge decides a case he attempts "to discover and make explicit the rule that is implicit in the practices, customs, and institutions of the people. ... Law then develops through the application of the rule to new situations."[87] But as Liggio and Palmer note,

> This process reveals another analogy with the decentralized market process, for the decision of a judge in a particular case is subject to review by other participants in the legal process. One judge cannot impose his personal will or idiosyncratic interpretation of the law on the entire legal system; similarly,

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[85]Leoni, *supra* note 2, at 21, 158. *See also* Aranson, *supra* note 31, at 677-79; Mitchell & Simmons, *supra* note 72 (discussing the large number of special interest groups that accompany big government); and FREDERIC BASTIAT, THE LAW 17-18 (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, Dean Russell trans. 1950) (1850) (discussing ever-escalating conflicts among disparate special interest groups).

[86]*See supra* notes 33 and 74, and accompanying text.

[87]Liggio & Palmer, *supra* note 31, at 720-21.

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> innovations in the market process arise through the decentralized activities of entrepreneurs and firms and are then subject to the review of consumers, investors, and other market participants. In both the market process and the common law process there is little danger of having "all your eggs in one basket," as is the case with both socialism and legislation.[88]

Judges in a decentralized law-finding system are also less likely to be influenced by special interests than are legislators. Professor Epstein argues

> that structural features limit what the manipulation of common law rules can achieve. The more focused and sustained methods of legislation and regulation are apt to have more dramatic effects than does alteration of common law rules and thus will attract the primary efforts of those trying to use the law to promote their own interests.[89]

To the extent a court-based legal system displays legislative characteristics, which often occurs in government-based court systems,[90] it faces the same central planning problems as does legislation.[91] For example, judges that attempt in their decisions to "maximize society's wealth"[92] face the same information problems as a central economic planner.[93]

Judges, then, especially government-employed judges, can run into the legislator's ignorance problem when they act like legislators and pretend they are omniscient.

D. The Proliferation of Laws

A civilized society, like a functioning free market, develops spontaneously and is tremendously complex. If a legislator attempts

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[88]*Id.* at 721, n.30.

[89]Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718-19 (1982).

[90]*See* Part III.B.2, *supra*.

[91]Aranson, *supra* note 31, at 697; Peter H. Aranson, *The Common Law as Central Economic Planning*, 3 CONST. POLITICAL ECON. 289, 297-99 *et passim* (1992).

[92]Aranson, *supra* note 31, at 692.

[93]*Id.* at 697-98 (emphasis added) (footnotes omitted). *See also* Aranson, *supra* note 31, at 314.

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to plug one hole in a dike, he finds that ten more spring up. If he attempts to plug these ten, a hundred more result.

Legislation is nothing more than controls, and it is evident that controls breed yet more controls. And invariably, because of government propaganda combined with public ignorance, the inevitable failures of the nostrum of legislation are blamed, not on the interventionist government, but on freedom and unregulated human conduct. Thus even more controls are imposed to solve problems caused by controls in the first place, and the process accelerates. For example, the well-known boom-bust business cycle, with its recurrent depressions and recessions (such as the Great Depression and recent recessions), is caused, not by capitalism, but by government manipulation of the money supply (which is, of course, only possible with legislatively-created institutions such as the Federal Reserve).[94] When such government-caused calamities strike, the current Roosevelt or Clinton milks the disaster as an excuse for more government intervention and power.[95] Thus, legislation has a ratcheting effect whereby statutes tend to lead to further statutes and the government sphere expands outward as these statutes cascade down from generation to generation.

Such a continual outpouring of laws has many insidious effects. As has wisely been said, "The more corrupt the Republic, the more the laws."[96] But the reverse is also true. As special interest groups become successful, others become necessary for self-defense, and soon a legal war of all against all begins to emerge, as already discussed.[97] The ability of legislators to change laws reduces legal certainty, which makes contractual reliance more risky and hampers useful economic transactions. Uncertainty also increases the general time preference rate, which shortens the structure of production,

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[94]*See* MURRAY N. ROTHBARD, AMERICA'S GREAT DEPRESSION (New York: New York University Press, revised ed. 1975); *idem*, 2 Man, Economy, and State, *supra* note 55, at 854 *et seq.*; *idem*, For a New Liberty, *supra* note 22, at chapter 9; Mises, *supra* note 55, chapter XX esp. p. 561.

[95]*See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT (New York: Oxford University Press, 1987).

[96]TACITUS, ANNALS, III, 27, quoted in Sartori, *supra* note 30, at 3.

[97]*See supra* note 85 and accompanying text.

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thereby impoverishing society. The ensuing higher time preference also increases the prevalence of criminal activity.[98]

Additionally, when so many laws exist, and with such arcane, vague, complex language, it becomes almost impossible for each citizen to avoid being a law-breaker, especially when we have the perverse rule that "ignorance of the law is no excuse." Even government officials cannot seem to obey federal tax laws regarding household help. Almost everyone has violated a tax law, securities regulation, "racketeering" law, drug law, handgun law, alcohol law, customs regulation, anti-sodomy law, or at least traffic ordinance. But when we are all law-breakers the law is discredited[99] and, what is worse, the government can selectively and arbitrarily enforce whatever law is convenient against whichever "trouble-maker" it wishes.

Furthermore, "the legislative conception of law accustoms those to whom the norms are addressed to accept any and all commands of the State, that is, to accept any *iussum* as *ius*."[100] People become more accustomed to following orders, and thus become more docile, servile, and less independent. Once people become docile and lose their rebellious spirit, "[t]he road is cleared for the legal suppression of constitutional legality. Whoever has had the experience of observing, for example, how fascism established itself in power knows how easily the existing juridical order can be manipulated to serve the ends of a dictatorship without the country's being really aware of the break."[101]

Legal inflation cheapens and dilutes law, just as money inflation by the Federal Reserve dilutes dollars and causes price inflation. True Law becomes smothered by legislation.

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[98]*See supra* notes 55-61 and accompanying text.

[99]Professor Benson notes that such a proliferation of laws "leads to selective enforcement, corruption, *and* open tolerance of illegal acts. Clearly a negative externality is created as respect for and fidelity to all law is harmed when large numbers of such largely unenforceable laws are openly defied." Benson, *supra* note 22, at 286.

[100]Sartori, *Liberty and Law, supra* note 30, at 38-39.

[101]*Id.* at 39. *See also* Benson, *supra* note 22, at 282 ("it appears that the increasing centralization of law-making has been associated with increasing transfers of property rights from private individuals to government or perhaps, more accurately, to interest groups.") (endnote omitted).

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IV. Naive Rationalism and The Primacy of Legislation

If the arguments made herein are correct, no centralized legal system can be a rationalist system, because legislation undermines the rationalist, libertarian virtues of individualism, individual liberty, and the rule of law. Why, then, is the civil law proclaimed as the great rationalist legal system, even though it sets up legislation as the primary source of law? Why are legislation and codification hailed as superior, scientific, and rational? Why, for that matter, is legislation so popular today even in common-law regimes, as well as in our federal system? It seems somewhat strange that those who support individual liberty, justice, and the rule of law would also support the very thing that opposes and erodes these things.

In Hayek's view, there are two types of rationalism: evolutionary rationalism (or, in Karl Popper's terminology, critical rationalism) and constructivist rationalism (Popper's naive rationalism).[102] Each of these two variants of rationalism is associated with a unique view of liberty. Critical rationalism, i.e. true rationalism, relates to a "British" theory of liberty that derives from thinkers such as Locke, Hume, Smith, Burke, Montesquieu, de Tocqueville, and Lord Acton, while the "French" version of rationalism, i.e. naive rationalism, derives from Rousseau, Condorcet, Hobbes, and Descartes.[103] Hayek believed that "all modern socialism, planning and totalitarianism derive" from the naive rationalism of the French tradition.[104]

Like the socialists who naively believe that the delicate order of the market, coordinated by millions of individual interactions, can be

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[102]F. A. HAYEK, I. LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 5-6 (Chicago: University of Chicago Press, 1973). *See also id.* at 72, 118; *idem*, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM, Volume I of the COLLECTED WORKS OF F.A. HAYEK (Chicago: University of Chicago Press, W.W. Bartley, III, ed., 1989); *idem*, THE CONSTITUTION OF LIBERTY 38 *et seq.* (Chicago: University of Chicago Press, 1960); Eugene F. Miller, *The Cognitive Basis of Hayek's Political Thought*, in LIBERTY AND THE RULE OF LAW, *supra* note 36, at chapter 11, p. 242, 245 (discussing the two kinds of rationalism and their political consequences); JOHN GRAY, HAYEK ON LIBERTY 10 (Oxford: Basil Blackwell, 1984); Sartori, *Democratic Theory*, *supra* note 9, at Chapter XI (discussing rationalism vs. empiricism).

[103]Miller, *supra* note 102, at 245.

[104]*Id.* at 246.

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replaced by the brute force of a central planning board, naive rationalists have an almost superstitious faith in the ability of reason to impose law on society.

> In Hayek's view, the decisive influence on the French Enlightenment political theory was the philosophy of Descartes, with its extravagant assumptions about the powers of human reason. Cartesian [i.e. naive] rationalism lead to the belief that everything which men achieve, including liberty, is the direct result of reason and therefore should be subject to its control. It traced all order to deliberate human design and expressed contempt for institutions that were not consciously designed or not intelligible to reason.[105]

But naive rationalists fail to appreciate the true role of spontaneous order in human society. Because they did not understand, for example, that resources are allocated rationally only in a decentralized free market, a free market appears chaotic and unruly, as something that should be tamed and replaced with "scientific" central planning.

The belief of civilians and other proponents of centralized law-making that true Law ever could be made by a legislature stems from a naive rationalism because it assigns too broad a role to deductive reason. This is not surprising, given the French influence on the development of modern civil law. Reason is our only means of knowledge, but we would not attempt, for example, to take a sick person's temperature by closing our eyes and deducing it. Instead, we would measure it, if we realized that a pure exercise of deductive thinking cannot hope to give us this information.[106] This would be naive.[107]

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[105]*Id.* at 246-47 (footnote omitted).

[106]*See* Hayek, I. *Law, Legislation and Liberty*, *supra* note 102, at 29 ("to make reason as effective as possible requires an insight into the limitations of the powers of conscious reason .... [O]ne of the tasks of reason is to decide how far it is to extend its control or how far it ought to rely on other forces which it cannot wholly control.").

[107]Hayek himself has been criticized for assigning too little role to reason, on the part of individuals within a spontaneous free market order. *See* Hans-Hermann Hoppe, *F.A. Hayek on Government and Social Evolution: A Critique*, 7 REV. AUSTRIAN ECON. 67 (1994). Hayek's teacher Mises, as opposed to Hayek, viewed laws, morals, market customs, and the price system, as products of individual, rational, human action. "While these institutions were not created out of whole cloth by a single mind, political fiat or 'social contract,' they are

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A genuine market order can only be generated from the bottom up by the free interaction of private property owners. Given this fact, it is rational not to destroy this order by the top-down commands issued by a sovereign central planner. A detailed body of law, while based on fundamental norms established by and compatible with true rationalism, can only be discovered and established in a decentralized fashion; and it is clear that centralized legislative commands can only disrupt and distort the spontaneous and rational development of Law. The championing of legislation, not to mention central economic planning, thus irrationally ignores the reality that Law is compatible only with a decentralized law-finding system, and it ignores the inevitable negative effects of attempting to legislate (i.e. uncertainty, proliferation of the laws, special interest wars, unintended effects). The civil law worships legislation because of a desire to impose "order" on a field where there is already spontaneous order. This naive rationalism is not really rationalism at all: it is anti-rationalism or irrationalism.

The desire to plan, to impose order — whether economic or legal — on others, is dangerous because, in the name of reason and freedom, individual freedom is smothered. As Thomas Sowell writes,

> At its most extreme, [rationalism] exalts the most trivial or tendentious 'study' by 'experts' into policy, forcibly overriding the preferences and convictions of millions of people. While rationalism at the individual level is a plea for more personal autonomy from cultural norms, at the social level it is often a claim — or arrogation — of power to stifle the autonomy of others, on the basis of superior virtuosity with words.[108]

Bentham is a good example of the dangerous arrogance of naive rationalism. Bentham longed to (legislatively) codify his utilitarian "greatest happiness principle," and thus to use legislation as necessary to sweep aside any common law in his way. He

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indeed the products of rational and intentional planning by human beings, whose thoughts and actions continually reaffirm and reshape them in the course of history." Joseph T. Salerno, *Ludwig von Mises as Social Rationalist*, in LUDWIG VON MISES: CONTRIBUTIONS IN ECONOMICS, SOCIOLOGY, EPISTEMOLOGY, AND POLITICAL PHILOSOPHY (Norwell, Mass.: Kluwer Academic Publishers, Jeffrey M. Herbener, ed., 1993), p. 216.

[108]THOMAS SOWELL, KNOWLEDGE AND DECISIONS 102-03 (New York: Basic Books, Inc., 1980).

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> evinced no misgivings about the power or reason — in particular Bentham's reason — to decide any questions of policy *de novo*, without benefit of authority, consensus, precedent, etc. ... Bentham is not a little the fanatic whose willingness to sweep aside the obstacles to implementation of his proposals draws sustenance from a boundless confidence in his own reasoning powers. ... Bentham's blind spot about the problem of social order is of a piece with his enthusiasm for social planning. He worried about all monopolies except the most dangerous, the monopoly of political power.[109]

Because the civil law and, indeed, all modern law, gives license to legislators, it is irrationalistic, and does not promote, but hinders, individual liberty and the true development of Law.

V. The Role of Legislation and Codification

A. The Role of Legislation

1. The Secondary Role of Legislation

Does all this mean that there is absolutely no room for legislation? If anarcho-capitalism is accepted, of course there may be no legislation because there may be no government. Relaxing this assumption, if there is a government then even if it is a minimalist one it seems that there must effectively be some legislation, if only to determine the structure and function of the government itself. In this case, the points made in this paper militate against any legislation at all other than that strictly necessary to govern the government itself (e.g., a written constitution).

Even if there is a government, the body of law in society should be fashioned by a decentralized court system. The courts should be part of a private system of courts to the extent possible, for example a competing system of arbitral tribunals, rather than government-backed common-law courts. But whether law-finding fora are government courts or private courts, the legislature should have no

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[109]Posner, *supra* note 37, at 594, 603-606. For a discussion of Bentham and David Dudley Field, another proponent of common-law codification, and of anti-codifiers such as James C. Carter, see Lawrence M. Friedman, *supra* note 78, at 391-92, 403-406.

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ability to enact "laws" that have any effect on the decisions that courts make.[110]

If we relax the anarchist/minimal state assumption once more, and admit that a legislature should in some special cases be able to enact statutes to override court decisions, clearly legislation should never be seen as even *a* primary source of law, much less *the* primary source of law, lest all the law-destroying features described herein arise.

Even Leoni was not a complete anarchist, and believed in the necessity of at least some legislation.[111] According to Leoni, the role of legislation should be kept very small, and applied only very carefully.

> Substituting legislation for the spontaneous application of nonlegislated rules of behavior is indefensible unless it is proved that the latter are uncertain or insufficient or that they generate some evil that legislation could avoid while maintaining the advantages of the previous system.[112]

Not much, if any, of today's legislation could survive this test. Legislation must be restricted to a strictly secondary role, for a system based on the *primacy* of legislation will inevitably subvert the spontaneous order and substitute pernicious and chaotic rules in its stead.

2. *Alleged Deficiencies of Decentralized Law-Finding Systems*

Hayek, another advocate of the spontaneous order of decentralized systems, also believed that legislation is called for in certain situations.[113] Hayek maintained that the fact that a "grown"

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[110]This is not, however, to say that the judicial branch of a government should have the power of judicial review with respect to other branches of the government. Ideally, the legislative, judicial, and executive branches each have an equal and independent power to interpret the constitution. *See* William J. Quirk and R. Randall Bridwell, *Angels to Govern Us*, CHRONICLES, March 1995, p. 12 (excerpted from a forthcoming book of the same title).

[111]Leoni, *supra* note 2, at 10 and 129-31.

[112]*Id.* at 14. *See also id.* at 178 ("Whatever is not positively proved worthy of legislation should be left to the common-law area.").

[113]Hayek, *I. Law, Legislation and Liberty*, *supra* note 102, at 88, subsection entitled "Why grown law requires correction by legislation."

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system of law has some desirable characteristics that legislation usually does not,

> does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation.[114]

Hayek also maintained that the judicial, evolutionary growth of law may be "too slow" to bring about the "desirable" rapid adaptation of the law to wholly new circumstances. Further, according to Hayek, a judge would have to upset "reasonable expectations created by his earlier decisions" to overturn an erroneous line of cases, whereas a legislator can promulgate a new rule which is to be effective only in the future.[115]

Richard Epstein, a brilliant proponent of the common law, also feels that legislation is sometimes desirable, for example when courts cannot come up with a number, such as a statute of limitations, which might be very desirable.[116] Without legislation, courts would likely bar lawsuits after some length of time. But it is possible that different courts would have different limitations periods, and some judges may decide each case on its own merits. According to Epstein, without a statute of limitations, no court would develop a hard and fast, arbitrary number.[117] Rather, in a pure court system, individuals could only estimate the probability of being able to sue (or to be sued) after a given number of years. By

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[114] *Id.* at 88 (also citing Leoni, *Freedom and the Law*, *supra* note 2).
[115] *Id.* at 88-89.
[116] Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L. Q. 667, 680-81 (1986).
[117] *Id.* at 680.

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contrast, the number is certain under a statute of limitations. Because certainty is desirable, and because people are risk-averse, "A single number stated in advance truncates the risk [by] making it clear that some actions cannot be brought."[118]

Even Blackstone was not "an uncritical opponent of statutory law. . . . . Blackstone assigned a limited role to statutory law: its proper office was to resolve conflicts between common law precedents and otherwise to supplement and patch common law doctrine."[119]

But is the common-law's development "too slow," at least on occasion, as Hayek claimed? The U.S. Supreme Court has praised the common law's "flexibility and capacity for growth and adaptation" as "the peculiar boast and excellence of the common law."[120] For example, as Blackstone points out, judges under the common law were able to reform the system of feudal land law without legislation.[121]

So certainly decentralized systems are able to adapt to new situations when it is called for, at least sometimes.[122] Additionally, it is not always desirable that basic rules (such as contracts should be fulfilled) should change just because societal conditions change. Professor Epstein has explained that

> Social circumstances continually change, but it is wrong to suppose that the substantive principles of the legal system should change in response to new social conditions. The law should not be a mirror of social organization. In private law matters, it can best perform its essential function only if it remains constant.[123]

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[118] *Id.* at 681.

[119] Posner, *supra* note 37, at 585 (citing 3 Blackstone, *supra* note 37, at *328, and 1 Blackstone § 432, *365).

[120] *Hurtado v. People of California*, 110 U.S. 516, 530 (1884). However, a private court system is an unadulterated decentralized system, unlike the common law, which is backed by government force. *See* Part III.B.2, *supra*. Therefore, it will adapt more efficiently and more quickly to change than a common-law system would. *See also* Benson, *supra* note 34, at 17, discussing the superior ability of the (private) Law Merchant, compared to the common law, to adapt and change in response to rapid changes in the commercial system.

[121] 3 Blackstone *supra* note 37, at *268.

[122] *See also* Benson, *supra* note 22, at 283, n.42, and works cited therein.

[123] Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253, 254 (1980).

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Further, one wonders how any external observer, such as Hayek or any legislature, could ever know what rate of legal change is "too slow," or even what change is "desirable," any more than a central planning board can know what is the "right" price to charge for a gallon of milk. Indeed, Hayek's own insights into the virtues of spontaneous order and the problems of central economic planning demonstrate the ignorance of any central planner in this regard.

I admit that, in some circumstances, a decentralized body of law can err, and seem to need "patching"; and indeed, all things being equal, a statute of limitations might be better than none at all. Unfortunately, however, all things are *not* equal, because of the problems that inevitably accompany legislation. The choice is between a fallible system of decentralized law with no legislature and an even more fallible and dangerous legislative means of making law. To "patch" common law by legislation, you have to first empower a legislature. As Mises wisely put it,

> No socialist author ever gave a thought to the possibility that the abstract entity which he wants to vest with unlimited power — whether it is called humanity, society, nation, state, or government — could act in a way of which he himself disapproves.[124]

As Mises here warns, a legislature will not be content to merely fix one bad law. Rather, legislation will eventually overwhelm and suffocate the naturally-developed body of law and engender uncertainty; special interest warfare and quick fix laws will proliferate; and the government will eventually abuse its sovereign position by engaging in economic and human planning.

Epstein may well be correct that not having a definite period for liberative prescription may inject uncertainty into the legal process. Unfortunately, the attempt to cure this by empowering a legislature also increases the general uncertainty in society. Which uncertainty is greater? And what about the liberty of individuals who have their right to sue artificially limited by a statute of limitations? How can we know that the benefit to them (or even to others) is greater than the harm done to them? Because values are subjective to the individual, and because of the economic calculation problem, no central governmental legislature can know whether the benefits of a

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[124]Mises, *supra* note 55, at 692 (emphasis added).

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statute of limitations are worth the cost of such legislation.[125] Furthermore, why is it justifiable to harm one individual to benefit another?

Another problem with urging legislation as a solution to common law gone astray, is that this assumes that the legislature can be convinced to make the correct legal reform. First, this is a very dubious assumption, especially given the special interest lobbying that legislators face, and also given the fact that legislators tend to be people who are interested in power rather than philosopher-kings who want to do the right thing.[126] Second, if a proponent of legislation assumes that reasonable and humane legislators can see the light of reason and correctly reform the law, why is it not at least as likely that judges can be persuaded as well?

Especially in an anarcho-capitalistic system — i.e., in a free society — in which all courts are private and compete for business by selling and producing "justice," the courts at least have an incentive to continually refine the rules in a just direction. If Epstein and legislators can see the value of a fixed time limit to instituting a lawsuit, so can the public, which would create a demand for such a rule. Private court systems that offered such rules to cater to consumer demand would tend to draw more customers and lawsuits than relatively unjust competitor-courts. Thus there is a natural incentive for courts, at least competing courts in a free society, to search for justice and to strive to adopt it, so as to cater to a justice-seeking consumer base.

3. Structural Safeguards to Limit Legislation

For all these reasons, I do not believe that legislation is a legitimate or practical means of creating law, or even of patching it. If a legislature can be convinced to recognize and respect the right law, so can a decentralized court system, especially one competing with other courts for customers. Courts do not face the same

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[125]On the subjective theory of value, see Mises, *Human Action, supra* note 55, at 94-97, 200-206, 331-33 *et passim*; Rothbard, 1 *Man, Economy, and State*, *supra* note 55, at 14-17 (ch.I, §5.A); and ALEXANDER H. SHAND, THE CAPITALIST ALTERNATIVE: AN INTRODUCTION TO NEO-AUSTRIAN ECONOMICS ch. 4, esp. §2 (New York: New York University Press, 1984).

[126]For a related discussion, see FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (Chicago: University of Chicago Press, 1944), at ch. X, "Why the Worst Get on Top."

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pernicious and systematic incentives that legislators do to make bad laws, and many of them. And courts, if they go bad, at least have a more limited effect on society; whereas when legislatures go bad, there is no end to the evil that they can perpetrate.[127]

If legislation can be considered valid at all (given a governmental system), it can only be occasional or spurious legislation that modifies the body of law which is *primarily* developed by a court-based, decentralized law-finding system. If we must have legislation, several constitutional safeguards should accompany its exercise, to attempt to restrict legislation to a purely secondary role in the formation of law. Certainly, a supermajority,[128] and maybe a referendum, should be required in order to enact any statutes whatever, except perhaps for statutes that repeal prior statutes or that limit governmental power.

In addition to a supermajority requirement, another reform that might be considered would be for all legislation to be limited to replacing the opinion of a given court decision with a new decision, which is to have purely prospective effect. Then, if a given case or line of cases were issued that had particularly egregious reasoning or results, a supermajority could form in the legislature that would rewrite the unfortunate opinion in purportedly better form, and enact this into law, as if the court had first issued the rewritten decision. The rewritten opinion would then assume the status of a judicial precedent, at least for that court.

The benefit of this limitation is that it would prevent legislatures from enacting huge legislative schemes out of whole cloth. There would simply be no way for the legislature to enact an Americans with Disabilities Act, since any statute would really be a rewritten judicial opinion, and to the extent the legislated substitute opinion strayed from the facts of the particular case, it would be merely *dicta*. If a judge in a battery case, for example, ruled that the spotted owl or the intelligent socialist was now an endangered species, such language would be completely irrelevant, since it is beyond a judge's power to enact an Endangered Species Act in any judicial

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[127]Government power is always subject to abuse. The greater government's role in society, the greater the chance for serious abuse. As Professor Epstein notes, "The smaller downside of a small government is perhaps its greatest virtue." RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 316 (Cambridge, Mass.: Harvard University Press, 1995).

[128]*See* Leoni, *supra* note 2, at 178 n.5 (discussing a supermajority requirement as a way to tame legislators).

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opinion. Such a mechanism for legislation would allow very bad case law developments to be overcome, but would also severely restrict the ability of legislatures to radically restructure the law, and thus would reduce the incidence of vote-buying and special interest lobbying, the amount of uncertainty, the proliferation of statutes, and the amount of social planning and other mischief that a legislature might otherwise be inclined to engage in.

Other provisions that could help to limit the dangerous effects of having a legislature include a line-item veto by the executive branch, and sunset provisions that automatically repeal legislation unless re-enacted after a given number of years. Another useful prophylactic measure would be an absolute right to jury trials in *all* cases, civil or criminal (so that government could not escape the jury requirement by calling truly criminal sanctions "civil"), in which the application of a statute is involved. This should be combined with a requirement that the jury be made aware of their right to judge the *law*'s validity as well as the defendant's liability or guilt.[129]

The right of law-abiding citizens to own weapons of any sort, without any registration requirement, is also essential so that an armed public can stand as a last bulwark against a tyrannical government. Even with such safeguards, the power of a government armed with the power to legislate, the power to create and rewrite "law," is awesome, and fearsome, to behold.

B. The Role of Commentators and Codes

The criticisms of legislation apply even to civil codes, the most impressive component of modern civil law. Admittedly, the civil law, at least as embodied in a civil code (for example, the Louisiana Civil Code), is superior to the common law in many ways. The civilian system of property rights, not mired in feudalistic form as is the British common law, is much cleaner and conceptually more

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[129]The latter concept is advocated by many libertarians, and is often called the Fully-Informed Jury Amendment, or FIJA. *See* Don Doig, "New Hope for Freedom: Fully Informed Juries," pamphlet published by the International Society for International Liberty. For discussion of the historical and natural right of jurors to judge the law's validity, see also Comment, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L. J. 170 (1964); and LYSANDER SPOONER, *An Essay on Trial by Jury*, in THE LYSANDER SPOONER READER 122 (San Francisco: Fox & Wilkes, 1992).

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sound than is common law real property.[130] Common-law real property concepts are almost painful to the mind. As another example, the irrational common-law requirement of "consideration" to create a binding obligation[131] is replaced in the civil law with the more sensible prerequisite of "cause."[132] However, these superior qualities of the civil law are not due to its legislated character, but to the superior legal concepts that evolved in the Roman law.

But the civil code also contains many illiberal and thus illegitimate provisions, which are a problem only because the code is legislated into law. If the civil code were a private, unlegislated codification, judges could simply ignore its illiberal provisions. A particularly egregious example of an unjust law is Louisiana's forced heirship regime,[133] which limits individuals' ability to dispose of their own property as they wish upon death. Also, in Louisiana certain sales may be annulled if "too low" a price was paid by the buyer,[134] which violates the rights of property owners to dispose of their property, and which also foolishly assumes that the government knows better than the seller and buyer what the right price is for an item.[135]

Ignoring relatively minor problems such as these, the civil code in and of itself is largely commendable, especially insofar as it embodies and systematizes a naturally grown body of law.[136] But

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[130]*See also* Herman, *supra* note 5, at 46-47 (discussing the civil code's "highly stylized, streamlined system of ownership").

[131]*See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUMBIA L. REV. 269, 287-91 (1986) (discussing problems with the theory of consideration).

[132]La. Civ. Code art. 1967. For a discussion of the differences between cause and consideration, see Christian Larroumet, *Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law*, 60 TUL. L. REV. 1209 (1986).

[133]La. Civ. Code art. 1493.

[134]La. Civ. Code art. 2589.

[135]Another egregious provision in blatant contradiction to the individual right to absolute ownership of property is contained in articles 2626-27, which provide for expropriation of private property "wherever it becomes necessary for the general use." La. Civ. Code art. 2626. Of course, the United States Constitution suffers from the same defect. U.S. Const. Vth Amendment.

[136]*See* Thomas W. Tucker, *Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes*, 44 TUL. L. REV. 265 (1970); Rodolfo Batiza, *Origins of Modern Codification of the Civil Law: The French*

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the civil law is more than the civil code: it is legislation made paramount. Legislation is considered the primary source of law — indeed, the civil code itself is legislated — and thus all the problems of legislation discussed above apply to the civil law. When the civil code is enacted as a statute, it is no wonder that proponents of the civil code would naturally view legislation as supreme, and tend to view legislation as the primary source of law. And then even the civil code itself tends to develop legislative characteristics, such as code articles enacted at the behest of special interests; illiberal provisions such as those cited above; and specialized, detailed articles out of place in a generalized code.

The civil law would be much improved if the civil code were more like a constitution, in that its provisions would prevail over any contrary statute, and in that some sort of supermajority requirement would be needed to amend it. But we already have constitutions, both state and federal. I do believe that the basic libertarian principles specified herein — the individual rights to self-ownership and to own property, as embodied in the libertarian non-aggression axiom — should be followed by any judge, but this does not necessarily mean there must be a statute or constitution specifying these principles. It is only important that judges recognize them and, in the long run, this can only happen if a consensus in society recognizes the validity of such principles in the first place. Our task is always education. If the public were ever to become libertarian enough to adopt a libertarian constitution, one would probably not be needed, since private justice supplied on the market, or even in government-based common-law courts, would veer in a libertarian direction in response to the people's sense of justice.

But if a libertarian constitution or code were in place, it would be relatively sparse. It would specify as first principles that the initiation of force is illegitimate, and that the individual rights to own one's own body and any property one homesteads or acquires voluntarily from other owners are absolute and inviolable. As deductions therefrom, it could specify that rape, murder, theft, assault, battery, and trespass are also rights-violations. As Rothbard states:

> The Law Code of a purely free society would simply enshrine the libertarian axiom: prohibition of any violence against the

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Experience and its Implications for Louisiana Law, 56 TUL. L. REV. 477, 585 *et seq.* (1982) (discussing Blackstone's influence on Louisiana's civil code).

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> person or property of another (except in defense of someone's person or property), property to be defined as self-ownership plus the ownership of resources that one has found, transformed, or bought or received after such transformation. The task of the Code would be to spell out the implications of this axiom (e.g., the libertarian sections of the law merchant or common law would be co-opted, while the statist accretions would be discarded). The Code would then be applied to specific cases by the free-market judges, who would all pledge themselves to follow it.[137]

(I would add that the "libertarian" sections of Roman law, e.g. as embodied in modern civil codes, could be adopted in developing Rothbard's libertarian Law Code.)

But because of the near-infinite variety of ways in which humans can interact, such a code could never be made all-comprehensive. Any codifier who attempted to do this would face the information problems discussed herein. At some point judges need to consider the particular facts of a controversy and, keeping principles of justice in mind, eke out the applicable rule. Judges will sometimes make mistakes, but, then, the fact that individuals are fallible can never be escaped, so this criticism is moot.

It is true that a decentralized, gradually-developed body of case law can become unwieldy and difficult to research. But it is not more so than the modern morass of statutes. I cannot see how either a lawyer or the average layman would have an easier time discerning what law applies to him in a given situation under today's statute-ridden laws, as opposed to in a decentralized legal system having a body of judge-discovered principles. Surely in both cases laymen may resort to specialists such as attorneys and explanatory treatises to tell them what the law is. At least in a decentralized system the law is less likely to change from day to day, so that when a person knows what the law is today he is more certain it will be the law tomorrow. And there are likely to be far fewer laws regulating far fewer aspects of our daily lives in a judge-based system, which should make it easier to determine what the relevant law is concerning a given situation.

There is for these reasons a significant role for codification in a free society, but only for private, not legislative, codification. To the extent such private codes are systematic and rational, they can

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[137]Murray N. Rothbard, Power and Market: Government and the Economy 267 n.4 (1970); *idem*, *For A New Liberty*, *supra* note 22, at 230-31.

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both influence the rational development of the law and present or systematize it in concise form for lawyers and laymen alike. We already have treatises such as the *Restatements* of the law, *Texas Jurisprudence Third*, *American Jurisprudence Second*, and *Corpus Juris Secundum*. These treatises would be far more rational and systematic, and shorter, if they did not have to take an unwieldy and interfering body of legislation into account; if they could focus primarily on common-law developments. Legal scholars who currently draft civil code articles for consideration and enactment by a legislature could surely dedicate their energies to codifying and systematizing the body of case law that has been developed.[138]

Even a true codification of existing case law can make mistakes. If the code is private, judges can ignore the lapses in the commentator's reasoning. Of course, this has the extra benefit of giving an incentive to private codifiers not to engage in dishonest reasoning or meddlesome social planning. If a codifier wants his work to be used and acknowledged, he will attempt to accurately describe the existing body of law when he organizes and presents it, and will likely be explicit when recommending that judges adopt certain changes in future decisions.

Law codes should thus be strictly private. We have long seen the wisdom of keeping church and state separate. Theorists like Mises, and the collapse of socialism, teach the virtues of the separation of economy and state. Advocates of a libertarian social and legal order should favor the separation of law and state.[139]

VI. Conclusion

Virtues such as individual liberty and legal certainty, understood as aspects of a just, libertarian polity, are indeed objectively valid

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[138]Lawrence Friedman, *supra* note 78, at 406, states that the Field "codes are the spiritual parents of the Restatements of the Law—black letter codes of the 20th century, sponsored by the American Law Institute, but meant for persuasion of judges, rather than enactment into law." *See also* 3 Blackstone *supra* note 37, at *267 (discussing problems that arise when a new system of law is legislatively codified rather than built upon the evolved wisdom of courts). For a fascinating discussion of the significance of both private and legislated codes for the development of law, see Alan Watson, *The Importance of "Nutshells,"* 42 Am. J. Comp. L. 1 (1994).

[139]*See* Rothbard, *supra* note 22, at 228 (discussing the separation of law and state).

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standards that any legal system must uphold. Centralized legal systems — even those that attempt to embody libertarian virtues, such as the civil law — undercut individual rights, because in them legislation is made supreme and valid; because Law-finding is replaced with law-making.

Both the Roman law and common law have been corrupted into today's inferior legislation-dominated systems. The primacy of legislation should be abandoned, and we should return to a system of judge-made law — a private system, ideally, but in the direction of systems like the old common law and Roman law, at least. Scholars who codify naturally-evolved law have a vital function to serve, but they should not ask for the governmental imprimatur on their scholarly efforts.

Ultimately, the form of a legal system does not guarantee that just laws will be adopted. We must always be vigilant and urge that individual freedom be respected, whether by legislator or judge.

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